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DOCKET NO.: FST-CV15-5015035-S	:	SUPERIOR COURT
GIRL DOE PPA MOTHER DOE AND FATHER DOE, MOTHER DOE, INDIVIDUALLY AND FATHER DOE, INDIVIDUALLY	:	JUDICIAL DISTRICT OF STAMFORD/NORWALK
v.	:	AT STAMFORD
WILTON BOARD OF EDUCATION AND TOWN OF WILTON	:	MARCH 31, 2017

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Girl Doe PPA Mother Doe and Father Doe and Mother Doe and Father Doe, individually, submit this Memorandum of Law in opposition to the March 2, 2017 Motion for Summary Judgment ("Def. Mem.") of defendants Wilton Board of Education ("BOE") and Town of Wilton (collectively referred to as, "Wilton"). Principles of municipal immunity do not apply preclude plaintiffs' claims because: (1) Wilton has admitted that its employees were acting in a ministerial rather than discretionary capacity; and, (2) even if defendants' conduct were somehow considered discretionary rather than ministerial despite these admissions, plaintiffs were identifiable persons subject to the threat of imminent harm, which is a recognized exception to municipal immunity defenses.

INTRODUCTION

Connecticut municipal liability law invites motions for summary judgment in nearly every case in which a plaintiff seeks to recover against a municipality. Under the facts here,

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however, it is difficult to imagine how Wilton can bring such a motion in good faith. Witness after witness from Wilton has described how Wilton placed Girl Doe (and many other preschool students) at unquestionably high risk of being sexually victimized by a school staff member, and also that Wilton staff members: (1) violated the nondiscretionary obligation to follow clear existing policies designed to protect schoolchildren; and, (2) placed plaintiffs (and other identifiable victims) under the immediate and persistent threat of imminent harm.

The dangerous decisions made by Wilton's educational staff here would be shocking in any environment; the fact these decisions were made by educators in a public preschool in direct violation of school policy -- and with knowledge that they placed kids at risk of sexual abuse -- leaves no doubt whatsoever that plaintiffs' claims are recognized under Connecticut law.

FACTS

Wilton's Memorandum avoids mentioning many key facts that speak to the issues raised in their motion.

I. Von Kohorn's Sexual Assault of Girl Doe in January 2013

Wilton employed Eric Von Kohorn as a paraprofessional to work with preschool children at the Miller-Driscoll School, a public elementary school in Wilton.[1] Von Kohorn sexually

[1]Wilton does not mention that Eric Von Kohorn's employment by the Wilton Board of Education had an inauspicious start. On his resume, Von Kohorn flagrantly misrepresented his experience and qualifications working with children. The Board of Education never learned of his

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abused Girl Doe in the Miller-Driscoll School bathroom shortly after parent drop-off on the morning of December 21, 2012, the Friday before a holiday break. After returning home from school that afternoon, Girl Doe complained of pain while urinating and her mother noticed redness and swelling around Girl Doe's genitals. (Deposition of Mother Doe at 29-31, 32-34.)[2] When questioned by her mother, Girl Doe reported her injuries were caused when "Mr. Eric [Von Kohorn] wiped me too hard." (Mother Doe testimony, Exhibit 2 at 30-31.)

At the time, Girl Doe was fully toilet-trained and did not require assistance toileting. Furthermore, as is discussed in more detail below, Miller-Driscoll had a policy in place at the

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misrepresentations before hiring him because it never contacted Elizabeth Morelli, a co-worker from a previous job he held at St. Peter's Lutheran School in Norwalk and the lone person he listed as a reference related to his experience working with children (the other two listed references were from a local bakery and restaurant). Von Kohorn listed his duties at St. Peter's as including "setting curriculum," "hiring teachers," "teaching reading, math," "leading parent/teacher conferences," and "organizing payroll and tuition." (A copy of Von Kohorn's resume is attached as Exhibit 10.) After being subpoenaed, Ms. Morelli testified that no one from Wilton ever contacted her to check Von Kohorn's reference (and also that no one from Wilton contacted her after Von Kohorn's arrest, contrary to statements made to the media by Town officials). (See Morelli deposition at 8, 10-1, 18-20 and 33-4, attached as Exhibit 9.) Ms. Morelli also testified that if Wilton had contacted her, she would have informed Wilton that he did not perform *any* of the functions listed above while he worked as an assistant at St. Peter's Lutheran School.(See Morelli testimony, Exhibit 9 at 8, 10-1, 18-20 and 33-4.) Wilton School Superintendent Smith testified that if any prospective employee misrepresents his qualifications during the application process, the prospective employee is ineligible for employment by the BOE. (See Dr. Kevin Smith deposition at 73; Excerpts of deposition testimony of Dr. Smith are attached as Exhibit 1.)

[2] Excerpts of deposition testimony of Mother Doe are attached as Exhibit 2.

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time that: (1) strictly prohibited Von Kohorn from entering the bathroom alone with Girl Doe; and, (2) prohibited other staff members from allowing him to do so. (*See, e.g.*, Smith testimony, Exhibit 1 at 48-9; Deposition of Ann Paul at 42, 60-1;[3] Deposition of Fred Rapczynski at 98-9;[4] Deposition of Jim Martin at 50-1.[5])

After hearing Girl Doe's report and seeing her injuries, Girl Doe's parents immediately attempted to contact Miller-Driscoll School officials by telephone, but they were unable to connect until school resumed following the holiday break. Wilton's records reveal that on January 3, 2013, Girl Doe's father reached the Director of Preschool Services for the Wilton Board of Education, Dr. Fred Rapczynski, and informed him about the injuries Girl Doe's parents saw around Girl Doe's vaginal area, as well as her shocking reports that Von Kohorn had caused her injuries in the Miller-Driscoll School bathroom.

Connecticut General Statute § 17a-101a, as well as Wilton school policies existing at the time, required Dr. Rapczynski to make a written report to the Department of Child and Family Services ("DCF") within 48 hours as soon as he had "reasonable cause to suspect or believe that

[3] Excerpts of deposition testimony of Ann Paul are attached as Exhibit 3.

[4] Excerpts of deposition testimony of Fred Rapczynski are attached as Exhibit 4.

[5] Excerpts of deposition testimony of James Martin are attached as exhibit 5.

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a child under the age of 18 has been abused." Despite this statutory obligation, Dr. Rapczynski failed to report Girl Doe's suspected assault until four days later, on January 7, 2013. Incredibly, Dr. Rapczynski decided to delay making the report because he did not consider the information provided by Father Doe about Girl Doe's visible injuries and her report that Von Kohorn assaulted her to give him "reasonable suspicion" of suspected abuse. (Rapczynski testimony, Exhibit 4 at 80.) In fact, Dr. Rapczynski admitted the only reason ever made the DCF report at all was because Girl Doe's father specifically requested it. (Rapczynski testimony, Exhibit 4 at 76, 81.)

II. Wilton Interviews Von Kohorn.

After his discussion with Father Doe on January 3, 2013, Dr. Rapczynski interviewed Von Kohorn, who denied ever being alone with Girl Doe and specifically denied taking Girl Doe alone into the bathroom. Dr. Rapczynski accepted Von Kohorn's version of events at face value, despite Father Doe's report of seeing Girl Doe's physical injuries and Girl Doe's reported version of what happened. Dr. Rapczynski informed Girl Doe's parents that he had determined conclusively that Von Kohorn had never been alone with Girl Doe and so could not possibly have assaulted her.

When Mother Doe heard this, she informed Dr. Rapczynski that Von Kohorn's version could not be true because she saw Von Kohorn escort Girl Doe into the building during drop-off

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on the date of the assault. (Rapczynski testimony, Exhibit 4 at 88.) As a result, Dr. Rapczynski interviewed Von Kohorn a second time, at which time Von Kohorn admitted he had lied during his first interview and that in fact he had taken Girl Doe alone into the building, then alone into the Miller-Driscoll School bathroom. (Rapczynski testimony, Exhibit 4 at 88, 90.)

Significant to the issues raised in Wilton's motion, Von Kohorn also told Dr. Rapczynski that before bringing Girl Doe alone into the bathroom, he had informed another staff member and she was aware he was doing so. (Rapczynski testimony, Exhibit 4 at 91.) Dr. Rapczynski reported in writing to DCF that "Mr. Von Kohorn indicated he told another staff member he was taking [Girl Doe] into the bathroom."[6] (Emphasis Added.) (Rapczynski DCF report dated 1/8/13, attached as Exhibit 6.) The fact other Miller-Driscoll staff members knew Von Kohorn was taking Girl Doe alone into the bathroom is supported not only by Von Kohorn's own account, but also by Dr. Rapczynski's testimony that he thought it was likely other Miller-Driscoll staff members would have been present in the area during the busy drop-off time and would have seen Von Kohorn taking Girl Doe into the bathroom. (Rapczynski testimony, Exhibit 4 at 262.)

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[6] Defendants' motion rests on their surprising representation to this Court that there is no ministerial duty because the facts reveal "[t]here is no evidence that would be admissible at trial supporting the claim that any BOE agent or employee breached their obligation to enforce Wilton Preschool toileting policy." (See Defendants Memo. of Law at 15.) It is difficult to understand how Wilton can make this representation to this Court in light of the testimony of Dr. Rapczynski, as well as his own written report to DCF.

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Wilton has admitted that if Miller-Driscoll staff members allowed Von Kohorn to take Girl Doe alone into the bathroom, they violated their nondiscretionary obligation to prevent this from happening. According to Wilton School Superintendent Kevin Smith, Miller-Driscoll had a policy in place that: (1) prohibited adult staff members from entering the bathroom alone with preschool students; (2) prohibited male staff members from assisting female students in toileting under any circumstances; and, (3) *strictly required staff members to prevent others from acting in violation of this policy*. (Smith testimony, Exhibit 1 at 48-9.) The policy was not written, but Superintendent Smith testified it was a policy at Miller-Driscoll that "each and every teacher was required to follow under every circumstance," and that "staff members and teachers in the Miller-Driscoll School were required to follow under every circumstance." (Smith testimony, Exhibit 1 at 48-9.)

Other Wilton employees all agree. Wilton School Assistant Superintendent for Special Services, Ann Paul, testified that Von Kohorn violated Miller-Driscoll's toileting protocols as they existed when he took girl Doe alone into the bathroom, and that, although the protocol was written, it was a policy that Miller-Driscoll employees were required to "strictly follow" and "did not have the discretion to violate." (Paul testimony, Exhibit 3 at 42, 60-1, 75-6.) She also testified that the same policy *required other staff members to enforce the policy to prevent other staff from doing so.* (Paul testimony, Exhibit 3 at 75-6.) Wilton's Director of Preschool Services,

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Dr. Fred Rapczynski, said the same thing, explaining that male Miller-Driscoll staff members were "strictly prohibited with no exceptions" from being alone in the bathroom with female preschool students, and that staff members were required to prevent male staff members from being alone with female students in the bathroom and "did not have the discretion to permit it." (Rapczynski testimony, Exhibit 4 at 98-9.)

Likewise, Miller-Driscoll School social worker, James Martin acknowledged that "a staff member at Miller-Driscoll was not allowed to permit a male staff member to take a female preschool student into the bathroom alone," and that "staff members at Miller-Driscoll were required to follow those policies." (Martin testimony, Exhibit 5 at 51.) Thus, four separate Wilton representatives have confirmed separately that when the Miller-Driscoll staff permitted Von Kohorn to take Girl Doe alone into the bathroom, the staff violated a ministerial, non-discretionary obligation to prevent him from doing so.

III. Miller-Driscoll Staff Placed Girl Doe in Imminent Harm.

Although it may seem obvious that allowing a male staff member to take a fully toilet-trained female preschool student alone in a school bathroom would pose an imminent threat to the child's well-being, the Court need not rely solely on reason to reach this conclusion. Multiple Wilton school officials have admitted this point. Superintendent Smith, for example, testified that the moment Von Kohorn took Girl Doe alone into the bathroom, the situation posed an

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imminent threat to Girl Doe's well-being. (Smith testimony, Exhibit 1 at 95-6). He also testified he would have expected other staff members to understand that if Von Kohorn took Girl Doe alone into the bathroom, it "would pose an imminent threat to her well-being." (Smith testimony, Exhibit 1 at 96.)

Assistant Superintendent Ann Paul agreed, acknowledging in her deposition that allowing a male paraprofessional like Von Kohorn to be alone in the bathroom with a female preschool student could pose a threat to the well-being of the female student. (Paul testimony, Exhibit 3 at 77-9.) She further explained that the very reason staff members were not allowed to permit Von Kohorn to be alone with Girl Doe in the bathroom was because of the likelihood that harm could come to Girl Doe if it was permitted. (Paul testimony, Exhibit 3 at 77-9.) Miller-Driscoll social worker James Martin also testified that the Miller-Driscoll school understood that allowing adult staff members to be alone in the bathroom with preschool students – especially male staff members with female students – would pose a threat to the well-being of students. (Martin testimony, Exhibit 5 at 55-6.)

IV. Von Kohorn Continues Working at Miller-Driscoll

Wilton's conduct after Girl Doe's sexual assault, which forms the basis of additional claims of liability, may be the most disturbing aspect of the case. After learning that Von Kohorn had initially lied when he denied taking Girl Doe alone in the bathroom then later

admitted he had done so, Dr. Rapczynski submitted a second DCF report that noted Von Kohorn had changed his story. Dr. Rapczynski, however, never informed Girl Doe's parents that Von Kohorn admitted he had taken Girl Doe into the bathroom. The only information Girl Doe's parents were given about Dr. Rapczynski's investigation was Dr. Rapczynski's initial (wrong) conclusion, in which he had (incorrectly) determined Von Kohorn was never alone with Girl Doe. (Mother Doe testimony, Exhibit 2 at 88-90; Deposition of Father Doe at 61-64.[7]) As a result, Dr. Rapczynski left Girl Doe's parents under the continued mistaken belief that Von Kohorn had never been alone with Girl Doe and so never had the opportunity to assault her.[8]

Although not mentioned in its motion, Wilton has admitted in discovery that Dr. Rapczynski's responsibility to inform Girl Doe's parents that Von Kohorn took Girl Doe alone into the bathroom was a ministerial obligation, not a discretionary act. Superintendent Smith agreed that Dr. Rapczynsk's obligation to inform Girl Doe's parents of this new information was a "hard and fast obligation," and that Dr. Rapczynski did not have the "discretion to withhold the information." (Smith testimony, Exhibit 1 at 131-32.)

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[7] Excerpts of deposition testimony of Father Doe attached as Exhibit 7.

[8] School social worker James Martin also was aware that Von Kohorn initially denied taking Girl Doe into the bathroom alone and later admitted he had done so. Mr. Martin elected not to inform the parents of this discrepancy "because I didn't think it was my place to do that." (Martin, testimony, Exhibit 5 at 73.)

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Furthermore, Dr. Rapczynski's failure to inform Girl Doe's parents that Von Kohorn admitted to having taken her alone into the bathroom itself posed the threat of imminent harm to Girl Doe in two important ways:

- it led Girl Doe's parents to the inescapable (but entirely incorrect) concerns that: Girl Doe made up the whole story; Girl Doe was untrustworthy; Girl Doe could not possibly have been sexually assaulted by Von Kohorn because she was never alone with him; and, perhaps most important, Girl Doe did not require further evaluation or treatment for sexual abuse; and,
- it led Girl Doe's parents to believe that Von Kohorn's continued contact with Girl Doe and other preschool students in the Miller-Driscoll School did not pose any continuing threat to her well-being.

Of course, both conclusions were wrong and posed an imminent threat to Girl Doe's well-being by preventing Girl Doe from receiving the evaluation and treatment she required, causing Girl Doe's parents to question the validity of her report and causing Girl Doe to be re-traumatized by continued daily exposure to Von Kohorn, her abuser.

Making matters worse, Wilton also admitted that no one from Miller-Driscoll ever reached any conclusion about whether Von Kohorn sexually abused Girl Doe before allowing him continued contact with Girl Doe and others at Miller-Driscoll. Wilton states in their

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Memorandum that Dr. Rapcyznski had "no idea" whether DCF ever investigated either of the reports he submitted about Von Kohorn's suspected abuse of Girl Doe. (Defendants' Memo at 6-7.) That would be bad enough if it were true; in fact, however, Dr. Rapczynski conceded he had no reason to believe anything was done by DCF to investigate either of the reports he submitted. (Rapczynski testimony, Exhibit 4 at 85, 109.) Assistant Superintendent Ann Paul was even more forthright, testifying she and others at Wilton knew that DCF did *not* investigate either report related to Von Kohorn's reported assault of Girl Doe. (Paul testimony, Exhibit 3 at 40.)

Incredibly, after learning DCF did not investigate the matter, neither Dr. Rapczynski nor anyone else at Miller-Driscoll took any steps on behalf of Wilton to determine whether Von Kohorn had sexually assaulted Girl Doe. (Rapczynski testimony, Exhibit 4 at 113.) Dr. Rapczynski testified that as of January 9, 2013, he had not reached a conclusion one way or the other about whether Von Kohorn had assaulted Girl Doe, meaning "maybe she had been assaulted and maybe she had not." (Rapczynski, testimony Exhibit 4 at 113.) And although the possibility that Von Kohorn had sexually abused Girl Doe remained very much an open question in his mind, Dr. Rapczynski nonetheless permitted Von Kohorn to continue working closely with preschool students at Miller-Driscoll for another year and a half without any new or additional supervision. (Rapczynski testimony, Exhibit 4 at 125-28 and 132-33.)

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Girl Doe's parents remained completely in the dark, but Dr. Rapczynski was not the only Miller-Driscoll staff member who secretly wondered whether Von Kohorn had sexually abused Girl Doe. Miller-Driscoll staff social worker James Martin also knew in January 2013 that Girl Doe had reported Von Kohorn sexually assaulted her. (Martin testimony, Exhibit 5 at 15-6.) Like Dr. Rapczynski, Mr. Martin testified that after learning of the report he never formed an opinion one way or another about whether Girl Doe was sexually assaulted by Von Kohorn. (Martin testimony, Exhibit 5 at 98-105.) Mr. Martin also said he had numerous conversations with other Miller-Driscoll staff members during the year and a half Von Kohorn worked at Miller-Driscoll after Girl Doe's reported sexual abuse about the staff's discomfort with working side-by-side with Von Kohorn while the question of whether he had sexually abused Girl Doe remained unanswered. (Martin testimony, Exhibit 5 at 98-105.)

Mr. Martin's testimony makes it clear there was widespread suspicion among the Miller-Driscoll staff about whether Von Kohorn molested Girl Doe, but while the Miller-Driscoll staff wondered, Girl Doe's parents had no idea the assault was even a possibility. It makes good sense that Miller-Driscoll staff members were uncomfortable working with Von Kohorn for a year and a half while they quietly suspected him of sexually abusing Girl Doe, but one can only imagine the level of distress Girl Doe experienced from continued daily exposure to her abuser.

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V. Von Kohorn's Arrest for Child Pornography.

In August 2014, about a year and a half after Von Kohorn sexually assaulted Girl Doe, he was arrested on charges of possession and distribution of child pornography and later convicted of illegal possession of child pornography. Superintendent Smith learned from police shortly after the arrest that Von Kohorn's computer contained "bad stuff," including child pornography depicting children of a variety ages, ranging from photographs or videos of "infants being sexually assaulted," to images of a naked 15-year-old female. (Smith testimony, Exhibit 1 at 331-33.) An investigating detective told Dr. Smith that "[i]f I was a parent [of a child exposed to Von Kohorn in the Wilton Public Schools], I would be very concerned." (Smith testimony, Exhibit 1 at 331-33.)

ARGUMENT

I. The Summary Judgment Standard

"A trial court may appropriately grant a motion for summary judgment only when the affidavits and evidence submitted in support of the motion demonstrate that there is no genuine issue of material fact remaining between the parties and that the moving party is entitled to judgment as a matter of law." *Catz v. Rubenstein*, 201 Conn. 39, 48 (1986). "A material fact is a fact which will make a difference in the result of the case." *Gianetti v. United Healthcare*, 99

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Conn. App. 136, 141 (2007). "Issue of fact encompasses not only evidentiary facts in issue but also questions as to how the trier would characterize such evidentiary facts and what inferences and conclusions it would draw from them." *United Oil Co. v. Urban Redevelopment Commission*, 158 Conn. 364, 379 (1969). "[T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . The trial court's function is not to decide issues of material fact, but rather to determine whether any such issues exist." *Fleet Bank, N.A. v. Galluzzo*, 33 Conn. App. 662, 666 (1994).

"[I]n seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact..." *Socha v. Bordeau*, 277 Conn. 579, 585 (2006); *accord*, *Miller v. United Technologies Corp.*, 233 Conn. 732, 751 (1995). "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." *Morris v. Congdon*, 277 Conn. 565, 569 (2006). The non-moving party "is given the benefit of all favorable inferences that can be drawn." *Catz, supra*, 201 Conn. at 49. Summary judgment "is appropriate only if a fair and reasonable person could conclude only one way." *Miller, supra*, 233 Conn. at 751.

"[T]he determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder...." (Internal quotation marks omitted.) *Bonington v. Westport,* 297 Conn. 297, 307, 999 A.2d 700 (2010); see *Gordon v.*

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Bridgeport Housing Authority, 208 Conn. 161, 165, 544 A.2d 1185 (1988); see also *Gauvin v. New Haven,* 187 Conn. 180, 186, 445 A.2d 1 (1982). Testimony of a municipal official may provide an evidentiary basis from which a jury could find the existence of a specific duty or administrative directive. See, e.g., *Gauvin v. New Haven,* supra, at 186–87, 445 A.2d 1 (testimony providing evidence of nature of duty). *Wisniewski v. Town of Darien,* 135 Conn. App. 364, 374 (2012).

Moreover, "[t]his court has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm.... *Haynes v. City of Middletown,* 314 Conn. 303, 312–13 (2014). If there are unresolved factual issues material to the applicability of a municipal liability defense, "resolution of those factual issues is properly left to the jury." (Internal quotation marks omitted.) *Purzycki v. Fairfield,* 244 Conn. 101, 107–108, 708 A.2d 937 (1998).

II. Wilton's Conduct Violated Ministerial Obligations, And Were Not Discretionary Acts.

Numerous Wilton representatives have testified that the Miller-Driscoll School had a policy in place that strictly required staff to prevent male staff members from taking female preschool students alone into the bathroom. (See testimony of Smith, Rapczynski, Paul and

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Martin, as outlined in the facts section above.) Wilton admits that Von Kohorn stated he took Girl Doe alone into the bathroom with the knowledge and consent of another Miller-Driscoll staff member, a fact Dr. Rapczynski submitted in writing to DCF. This is admissible evidence, the existence of which raises a factual issue about whether Miller-Driscoll staff violated its nondiscretionary, ministerial obligation by permitting Von Kohorn to take Girl Doe alone into the bathroom. In light of these facts, Wilton cannot escape liability as a matter of law for the actions of its employees based on Connecticut's municipal immunity law.

C.G.S. § 52-577n establishes the circumstances under which a municipality may be liable for damages:

> (a)(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit... (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by ... (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.

A municipality is generally liable for the ministerial acts of its agents. *Haynes v. City of Middletown*, 314 Conn. 303, 312 (2014); *Edgertown v. City of Clinton*, 311 Conn. 217, 229 (2014). "A municipal employee ... has a qualified immunity in the performance of a governmental duty, but he may be liable if he misperforms a ministerial act, as opposed to a

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discretionary act." *Purzycki v. Fairfield*, 244 Conn. 101, 107 (1998). The hallmark of a discretionary act is that it requires exercise of judgment. (Citations omitted, internal quotation marks omitted.) *Strycharz v. Cady,* 323 Conn. 548, 565 (2016). Municipal employees are not immune from liability for negligence arising out of their ministerial acts, which are defined by as acts to be performed in a prescribed manner without the exercise of judgment or discretion. *Id.*

Connecticut law is clear that unless there is no legitimate issue of material fact, the question of whether actions are ministerial or discretionary is a question of fact for the fact finder to resolve. "Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder...there are cases where it is apparent from the complaint." (Internal quotation marks omitted). *Greenfield v. Reynolds*, 122 Conn. App. 465, 470 (2010). Where there is a factual dispute about whether a mandatory rule or policy exists, courts should deny motions for summary judgment and leave the issue to the jury. *See Black v. Town of Westport*, 2013 WL 3388898 (Super. Ct., Jud. Dist. Stamford-Norwalk, 6/17/13, Tierney, J.)[9] (summary judgment denied where it was unclear whether the defendants' gymnastics safety policy or the gymnastics policy of the National Federation of State High School Associations imposed upon defendant gymnastics coach various ministerial duties).

[9] All unreported cases are attached as Ex. 8.

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"Cases that have found the duties to be ministerial have looked for the existence of a written policy or directive." *Black, supra*, 2013 WL 3388898 at *5. Specifically with respect to school policies, "[u]nder Sec. 52-557n, if a board of education creates a policy or procedure requiring a school employee to act without the use of discretion, a court may conclude that such act or omission constitutes a ministerial duty." *Kolaniak v. Bd. Of Ed. Of City of Bridgeport*, 28 Conn. App. 277, 281-282 (1992); *Doe v. Westport Bd. of Educ.*, 2012 WL 1004308 at *4 (Super. Ct., Jud. Dist. of Fairfield, 2/29/12 (Bellis, J.). Indeed, "*if a policy exists that mandates that a school official take a certain action which he or she then fails to do, a court may conclude that a ministerial duty exists as a matter of law*." *Podgorski v. Pizzoferrato*, 48 Conn. L. Rptr. 613, 615 (Super. Ct. Jud. Dist. of Hartford, 10/7/09) (Peck, J.) (emphasis added).

Of particular significance here, "*[o]ur Supreme Court has stated that definitive words, such as 'must' or 'shall,' ordinarily express actions of a mandatory nature.* Additionally, the use of the word 'will' rather than 'may' suggests that an act is intended to be more than permissive or advisable." *Doe v. Westport Bd. of Educ., supra*, 2012 WL 1004308 at *5. (Internal quotations omitted, emphasis added). The testimony of a municipal official ... may provide an evidentiary basis from which a jury could find the existence of a specific duty or administrative directive. *Wisenewski v. Town of Darien*, 135 Conn.App. 364, 374 (2012).

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It is within this framework that facts uncovered in discovery here must be analyzed. The following facts have been established, which, taken together, preclude summary judgment:

(1) the Miller-Driscoll School had in place a toileting policy that strictly prohibited male staff members from being alone with female preschool students in the bathroom[10] (*See* Rapczynski testimony, Exhibit 4 at 88-90, 98-9; Smith testimony, Exhibit 1 at 48-9; Paul testimony, Exhibit 3 at 42, 60-1.);

(2) the same policy – which all staff were strictly required to follow without exception -- also required other staff members to prevent male staff members from taking a female preschool students alone into the bathroom. Wilton agents have admitted that this policy did not permit school staff any discretion to disregard this obligation and permit Von Kohorn to take Girl Doe alone into the bathroom (*See* Smith testimony, Exhibit 1 at 48-9; Paul testimony, Exhibit 3 at 75-6; Rapczynski testimony, Exhibit 4 at 98-9; Martin testimony, Exhibit 5 at 51.); and

(3) Von Kohorn reported that he took Girl Doe alone into the bathroom with the knowledge and consent of another staff member, a fact Dr. Rapcyznski himself reported to DCF. (*See, e.g.*, Smith testimony, Exhibit 1 at 48-9; Paul testimony, Exhibit 3 at 75-6; Rapczynski

[10] This policy was a Miller-Driscoll School policy, not a policy enacted by the Board of Education.

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testimony, Exhibit 4 at 98-9; Martin testimony, Exhibit 5 at 52.)[11] These facts simply do not support summary judgment in Wilton's favor.

Likewise, Wilton's failure to inform Girl Doe's family that Von Kohorn admitted he took Girl Doe alone into the bathroom violated Wilton's ministerial obligation to inform Girl Doe's parents. (Mother Doe testimony, Exhibit 2 at 88-90; Father Doe testimony, Exhibit 7 at 61-64.) Indeed, Superintendent Smith testified that: (1) Dr. Rapczynski was obligated to inform Girl Doe's parents of Von Kohorn's admission that he took Girl Doe alone into the bathroom; (2) Dr. Rapcyznski's obligation was a "hard and fast obligation;" and, (3) Dr. Rapczynski did not have the "discretion to withhold the information." (Smith testimony, Exhibit 1 at 131-32.)

III. Wilton Placed Girl Doe Under Threat Of Imminent Harm.

Even if this Court were to find that the actions of the Wilton defendants were purely discretionary despite Wilton's own admissions to the contrary, an exception to the defense of municipal immunity exists when circumstances make it apparent to a public officer that his/her discretionary act would be likely to subject an identifiable person to imminent harm. This

[11] It is unclear how Wilton can assert in good faith in its papers that "[t]here is no evidence that would be admissible at trial supporting the claim that any BOE agent or employee breached their obligation to enforce Wilton preschool Toileting policy" in light of its knowledge of these facts that show just the opposite.

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"identifiable person-imminent harm" exception requires evidence of three elements: (1) an identifiable victim; (2) an imminent harm; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to harm. *Haynes v. City of Middletown, supra*, 314 Conn. at 312-13. All three elements exist here.

A. Girl Doe was an Identifiable Victim.

Girl Doe was a female preschool student who was known by school staff and who was escorted one-on-one into a public preschool building by a school staff member. "The question of whether a particular plaintiff comes within a cognizable class of foreseeable victims for purposes of [the identifiable victim in imminent harm] exception to qualified immunity is ultimately a question of policy for the courts…this involves a mixture of policy considerations and evolving expectations of maturing society…" (Citation omitted; internal quotation marks omitted.) *Prescott v. Meriden*, 273 Conn. 759, 763-64 (2005). "[T]his exception applies not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims." (Internal quotation marks omitted.) *Grady v. Somers*, 294 Conn. 324, 350-51 (2009).

"Our decisions underscore, however, that whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a class of foreseeable class of victims."

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(Citation omitted; internal quotation marks omitted.) *Strycharz v. Cady*, 323 Conn. 548, 575-76 (2016). "In fact, the only identifiable class of foreseeable victims that we have recognized is that of schoolchildren attending public schools during school hours because: they were intended to be the beneficiaries of particular duties of care imposed by law on school officials; they are legally required to attend school rather than being there voluntarily; their parents are thus statutorily required to relinquish their custody to those officials during those hours; and, as a matter of policy, they traditionally require special consideration in the face of dangerous conditions." (Citation omitted; internal quotation marks omitted.) *Id.* at 576.

Under Connecticut law, "the main purpose of charging school officials with a duty of care is to ensure that schoolchildren in their custody are protected from imminent harm." *Id.* at 578. "The imposition of that duty is predicated, in part, on our settled understanding of the need to safeguard children of tender years from their propensity to disregard dangerous conditions." (Citation omitted; internal quotation marks omitted.) *Id.* at 578. "Accordingly, we have recognized that when an imminent harm exists on school grounds, the school has a duty to protect children attending school from that harm." *Id.* at 579.

Here, Mother and Father Doe relinquished their custody of Girl Doe to the public Miller-Driscoll School, leaving no doubt that Girl Doe was an "identifiable person" within the meaning of the "identifiable person-imminent harm" exception.

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B. The Harm Faced By Girl Doe Was Imminent.

As clarified by our Supreme Court in *Haynes*, "the proper standard for determining whether a harm was 'imminent' is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." *Haynes, supra*, 314 Conn. at 324. As was made clear in *Haynes*, the "imminence" inquiry is "not focused on the *duration* of the alleged dangerous condition, but on the *magnitude of the risk* that the condition created," and the awareness of the public official of the hazard. *Id.* at 322 (Emphasis in original). The issue of whether a plaintiff faces imminent harm is generally an issue for the jury to decide: as long as a public official knows of the hazard, then it is up to the jury to assess whether it was apparent to that official that the dangerous condition was so likely to cause harm that she had a clear and unequivocal duty to act immediately to prevent it.

1. Allowing Von Kohorn to take Girl Doe Alone Into the Bathroom Subjected Girl Doe to the Threat of Imminent Harm.

Wilton officials have admitted repeatedly the obvious point that Girl Doe faced imminent harm as soon as Von Kohorn was permitted to take her alone into the bathroom. As is highlighted above, Kevin Smith, Ann Paul, and James Martin all admit that permitting an adult male staff member to take a toilet-trained female preschool student alone in the bathroom posed an imminent threat to the safety of the student. At the very least, these admissions raise a genuine

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issue of material fact on the issue. *See Mahon v. City of Hartford*, 2016 WL 785591 (Super. Ct., Jud. Dist. Hartford, 2/1/16, Peck, J.) (finding that the evidence supported application of the identifiable person-imminent harm exception where the principal testified that it was apparent to him that a dangerous condition was created when the school hallway lights were turned off).

2. Allowing Von Kohorn Back in Girl Doe's Classroom and Misleading Mother and Father Doe Subjected the Does to the Threat of Imminent Harm

The decision by Miller-Driscoll officials to permit Von Kohorn first to remain in the Miller-Driscoll School and later in Girl Doe's own class -- decisions made without any prior determination of whether Von Kohorn had molested Girl Doe -- posed a continuing threat of imminent harm to Girl Doe. As is noted above, Dr. Rapczynski returned Von Kohorn to his work with children at Miller-Driscoll, despite having never reached a conclusion about whether Von Kohorn sexually abused Girl Doe and without requiring Von Kohorn to have any additional supervision. In addition to being breathtakingly irresponsible, Dr. Rapczynski's decision placed an identifiable victim -- Girl Doe, a reported victim of sexual abuse -- under the threat of imminent harm from continued daily exposure to her abuser.

Wilton's notifying Mother and Father Doe that Von Kohorn never took Girl Doe alone into the bathroom and its failure to inform Mother and Father Doe that Von Kohorn admitted the opposite to be true also posed a threat of imminent harm to Girl Doe in two additional ways:

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first, it led Girl Doe's parents to the inescapable (but incorrect) conclusion that Girl Doe made up the whole story, was untrustworthy, could not possibly have been sexually assaulted by Von Kohorn and so she did not require any further evaluation or treatment; and second, that Girl Doe's parents had no reason to believe Von Kohorn's continued contact and exposure to Girl Doe and other preschool students posed any continuing threat to her well-being, which resulted in Girl Doe's continued daily contact with her abuser. Both conclusions were predicated on false information provided by Wilton to Mother and Father Doe, the effect of which was to cause further harm to Girl Doe.

IV. Plaintiffs' Claims For Negligent Infliction Of Emotional Distress Must Stand.

Not surprisingly, the same facts caused considerable emotional injury to Mother and Father Doe, both of whom now have to live with the fact that they permitted Girl Doe continued daily exposure to her abuser as a result of Wilton's conduct. Although defendants challenge the validity of Mother and Father Doe's claims, this challenge must be denied. The Third and Fifth Counts of Plaintiffs' Complaint set forth claims for negligent infliction of emotional distress ("NIED") on behalf of both parents.[12] The basis of these claims is that Mother and Father Doe were injured by the Wilton's deceptions, which directly led them to allow Girl Doe continued daily exposure to Von Kohorn.

[12] Mother and Father Doe have not and do not make any claims for bystander emotional distress.

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To make a claim for NIED, a plaintiff must introduce evidence showing that: (1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress. *Larobina v. McDonald*, 274 Conn. 394, 410 (2005). Mother and Father Doe have alleged each element of this claim and each is well supported by the evidence.

A. Dr. Rapczynski had a Non-Discretionary Obligation to Provide Mother and Father Doe Truthful and Accurate Information.

Defendants argue that Mother Doe and Father Doe's "claims grounded in negligence are barred by the doctrine of governmental immunity to which no exception applies." (Defendants' Memo. of Law at 25.) As discussed above and incorporated here, Wilton has admitted that Dr. Rapczynski had a nondiscretionary obligation to inform Girl Doe's parents of Von Kohorn's admission that he took Girl Doe alone into the bathroom. Superintendent Smith testified Dr. Rapczynski had a "hard and fast obligation" to inform Mother and Father Doe of this fact and also testified that Dr. Rapczynski did not have the "discretion to withhold the information." (Smith testimony, Exhibit 1 at 131-32.) In light of this testimony, Wilton's argument that the conduct at issue in Counts Three and Five of plaintiffs' Complaint was "within the discretion of the BOE's agents" is not supported by the evidence and must be rejected. (Defendant's Memo. of Law at 25.)

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Defendants next cite the Affidavit of Fred Rapczynski, apparently to support its argument that it was within his discretion how to communicate with parents. (Defendant's Memo. of Law at 25.) It is incredible, almost inconceivable, that Wilton is asking this Court to find as a matter of law that Wilton officials should be permitted the discretion to withhold information from parents about a school staff member sexually abusing a preschool student. Having made this request, however, Wilton must acknowledge that Dr. Rapczynski's affidavit directly contradicts the sworn testimony of Superintendent Smith, thereby at best creating an issue of fact.

B. Dr. Rapczynski had a Legal Duty to Inform Mother and Father Doe of the Results of his Investigation.

Wilton also argues that it owed no duty to Mother or Father Doe and, as a result, plaintiffs' NIED claims fail as a matter of law. When Wilton communicated with Girl Doe's parents about its findings related to Girl Doe's reports of sexual assault by Von Kohorn, however, it was required to communicate honestly without withholding or omitting criticial information. Wilton has cited no law to suggest otherwise, and none exists. "The existence of a duty is a question of law...We have stated that the test for the existence of a legal duty of care entails: (1) a determination of whether an ordinary person in defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result; and, (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the

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particular consequences or particular plaintiff in the case...The first part of the test invokes the question of foreseeability, and the second part invokes the question of policy." (Citation omitted; internal quotation marks omitted.) *Neuhaus v. Decholnoky*, 280 Conn. 190, 217-18 (2006).

1. Mother and Father Doe's Injuries Were Foreseeable.

First, it was foreseeable to Dr. Rapczynski that his negligence in withholding information about Von Kohorn's opportunity to sexually assault Girl Doe created an unreasonable risk of causing Mother Doe and Father Doe emotional distress. Dr. Rapczynski communicated the results of his first interview with Von Kohorn to Mother Doe and Father Doe, but failed to tell them the shocking information learned in the second interview. Of course, Dr. Rapczynski would have expected Mother and Father Doe would suffer emotional injury if they later learned that Dr. Rapczynski withheld crucial information about the fact Von Kohorn took their daughter alone into the school bathroom, thereby giving him the opportunity to sexually assault her, on the same day she reported being assaulted and had visible physical injuries in her vaginal area. Predictably, Wilton's deception has had severe consequences for Mother and Father Doe. Dr. Rapczynski's failure to meet his "hard and fast obligation" caused Girl Doe's parents to discount Girl Doe's reports of abuse and permit Girl Doe continued daily contact with her assailant, first in the school and then in her own classroom.

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Defendants cite *Giard v. Town of Putnam*, 2008 WL 5481273 (Super. Ct., Jud. Dist. Windham, 12/3/08, Booth, J.) for the proposition that school employees are not under any duty to act in any certain way towards the parents of a student and are protected by the doctrine of governmental immunity. *Giard*, however, is easily distinguished from the situation at bar. In *Giard*, the parents of a student who committed suicide brought claims of negligence and negligent infliction of emotional distress against the Town of Putnam, the Putnam Board of Education, and specific school officials, including a guidance counselor at Putnam High School. The *Giard* plaintiffs alleged that at some point during the day leading up to their decedent's suicide, the guidance counselor was confronted with information that the student was suicidal, but failed to act on that information or alert the parents.

The *Giard* parents alleged that the guidance counselor was negligent because of her failure to counsel or otherwise help the decedent or to warn the parents of the impending suicide. In ruling on the parents' claims of NIED against the guidance counselor, the Court specifically found that the guidance counselor's actions were discretionary, holding that the counselor's "actions were discretionary, and...no exception to immunity applies." *Id.* at 9.

Here, in stark contrast to *Giard*, plaintiffs have alleged -- and Wilton has admitted -- that Dr. Rapczynski had a nondiscretionary obligation to inform Mother and Father Doe when he learned Von Kohorn had been alone with Girl Doe in the bathroom. Therefore, unlike in *Giard*

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where there was no ministerial obligation, Wilton's conduct here was not discretionary and so principles of municipal immunity do not shield Wilton from liability as a matter of law.

2. Public Policy Supports Imposition of Liability.

Public policy also requires holding Wilton responsible for its conduct. Good public policy dictates that school officials be truthful and forthcoming to the parents of a preschool student about findings related to claims of sexual abuse in school. This is especially important in a case like this, where a school seeks permission from a child's parents to place a staff member accused of sexually assaulting a student back in her classroom. Public policy cannot support the notion of school officials deceiving parents -- intentionally or otherwise -- about a matter as important as child sexual abuse. Parents require truthful and accurate information so they can advocate for their children and make decisions in their childrens' best interests. Connecticut law provides no support for Wilton's request to find otherwise here.

C. Mother and Father Doe Have Produced Evidence of The Remaining Elements of NIED.

Defendants next make the conclusory assertion -- without providing any support -- that "even if this Court finds a breach of duty by the defendants, the plaintiff cannot establish the other elements of the claim." (Defendant's Memo. of Law at 25-26.) Wilton's decision not to discuss these elements is undoubtedly due to the fact plaintiffs obviously have met them. The remaining elements of a NIED claim are that the emotional distress be severe enough that it

might result in illness or bodily harm and that the defendant's conduct be the cause of the emotional distress. With respect to the first of these, Mother and Father Doe both testified that these events caused them to sustain significant emotional distress and required each to seek treatment of their emotional distress. (Mother Doe testimony, Exhibit 2 at 98-99; Father Doe testimony, Exhibit 7 at 59-61). As for the last point, Mother and Father Does' emotional injuries flow directly from the conduct at issue, as is alleged in the Complaint.

CONCLUSION

Wilton has admitted that: (1) defendants were acting in a ministerial, not discretionary, capacity; and, (2) Wilton's conduct posed the imminent threat of harm. To the extent Wilton wishes to challenge these points now, the best it can do is raise factual disputes that must be decided by the trier of fact, not by the Court on a motion for summary judgment. For these reasons, plaintiffs ask this Court to deny in full Wilton's motion for summary judgment. Plaintiffs further request whatever other relief the Court deems just and proper.

THE PLAINTIFFS,

BY *__/s/ 417769__*

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EXHIBIT 1

DOCKET NO.: FST-CV15-5015035-S

GIRL DOE PPA MOTHER DOE AND FATHER DOE, MOTHER DOE, INDIVIDUALLY AND FATHER DOE, INDIVIDUALLY,	SUPERIOR COURT JUDICIAL DISTRICT OF STAMFORD/NORWALK
v.	
WILTON BOARD OF EDUCATION AND TOWN OF WILTON	July 7, 2016

DEPOSITION OF KEVIN SMITH, PH.D

Taken before Gina M. Ruocco, LSR #516, Court Reporter and Notary Public within and for the State of Connecticut, pursuant to Notice and the Connecticut Practice Book, at Law offices of Silver Golub & Teitell, 184 Atlantic Street, Stamford, Connecticut on Thursday, July 7, 2016, commencing at 9:30 a.m.

BRANDON HUSEBY REPORTING & VIDEO
249 Pearl Street
Hartford, Connecticut 06103
(860)549-1850

January of 2013.

Q. Was there a -- a policy in the Wilton public schools related to toileting, written or otherwise, that existed in January of 2013?

A. According to Dr. Rapczynski, it was understood that a male staff member did not accompany individual female students to the bathroom. So in that regard, yes.

Q. All right. And is it your understanding there was no written policy in effect at that time?

A. My understanding is that -- according to Dr. Rapczynski, there was not a written toileting protocol.

Q. Is there now?

A. There is.

Q. When -- when was that formed?

A. I can't tell you specifically, but again according to Dr. Rapczynski, he said about the time of this incident.

Q. Was there -- was there an unwritten policy, to your understanding, in effect in the Wilton public schools related to preschool students in January of 2013 that male staff members were not allowed to accompany female preschool students alone into the bathroom?

A. Yes, according to Dr. -- Dr. Rapczynski, what he reported was that that was known and understood.

Q. And that was a policy that each and every teacher was required to follow under every circumstance?

A. If it's a policy, it would be.

Q. And likewise, it was a policy that other staff members or teachers were not to permit or allow a male teacher to go alone into the bathroom with a female preschool student in January 2013 at the Miller-Driscol School?

A. I think that's accurate.

Q. And that again would have been a policy that staff members and teachers in the Miller-Driscol School were required to follow under every circumstance?

A. Correct.

Q. Getting back to my original question, and I know we've strayed just a bit but I still don't have an answer to my question, and it's quite an important one to the family. Do you have an opinion based on all of the information you've gathered -- and I understand you've devoted considerable time and energy to the process of

A. To the best of my understanding.

Q. And you believe that he was in the bathroom.

A. I have no reason to doubt that.

Q. Not only do you have no reason to doubt it, you believe it to be true, correct?

MR. GERARDE: Objection to form.

A. Correct.

Q. So you know that he was in the bathroom with her when he had no legitimate reason to be in the bathroom with her, correct?

MR. GERARDE: Objection to form.

A. Correct.

Q. You know that she had visible irritation in the genital area when she got home from school that day, correct?

A. I don't know that. That's what the mother reported.

Q. You said earlier you consider that credible.

A. I -- I have no reason to doubt it. That's what the mother reported.

Q. Okay. So you know that the mother reported it. Do you have any reason, any reason at all why a parent would make that up and contact the

A. I think that's fair, yes.

Q. And would you agree that when he went into the bathroom with her, despite not having a legitimate reason for doing so, that that posed a threat to her well-being?

MR. GERARDE: Objection to form.

A. Yes.

Q. Okay. And the threat to her well-being was a threat that manifested itself the moment he went into the bathroom with her?

MR. GERARDE: Objection to form.

Q. The threat.

A. Sure.

Q. And so in that way you would agree --

MR. SLAGER: Withdraw the question.

Q. You would agree that when Von Kohorn went into the bathroom with Girl Doe, his doing so posed an imminent threat to her well-being?

MR. GERARDE: I object to the form.

A. Imminent threat?

Q. Means a threat that existed at the time he did it.

MR. GERARDE: Objection to form.

Q. Not a certainty, but a threat, an imminent threat.

A. Yeah. I'm just thinking through your words.

Yes.

Q. And similarly, you would have expected other Miller-Driscol School staff members to understand that were Von Kohorn to take Girl Doe into the bathroom alone, that that would pose an imminent threat to her well-being?

MR. GERARDE: Objection to form.

A. Yes.

Q. Okay, all right. Exhibit 1 which I asked you about before, what is your understanding of how this was put together?

A. I believe the parents expressed their concern to Dr. Rapczynski. He conducted the investigation. That is the summary of the investigation.

Q. And is this an investigation that was performed internally at the -- within the Wilton Board of Ed.?

A. Yes.

Q. Okay. And is this an investigation -- the report that's been marked as Exhibit 1 is a report that was prepared and prepared in connection with Dr. Rapczynski's role as the director of the

Q. So my question --

A. Understood, but I -- I was not superintendent in 2013 so the expectations may have been different.

Q. Maybe they were, but I would like to know what your expectations are, and I'd -- I'd like you to look at the events of early 2013 through the lens of your expectations.

A. Sure.

Q. And -- and my question is, as the superintendent of the Wilton public schools, is it your testimony that Dr. Rapczynski had the discretion to withhold the information in Exhibit 3 from the Doe parents?

MR. GERARDE: Objection to form.

A. I -- I believe it should have been shared.

Q. And is the reason it should have been shared because Dr. Rapczynski was required to share it with the parents once he learned of it?

MR. GERARDE: Objection to form.

A. That would be the expected practice.

Q. All right. And it's -- it's an expected practice that is not left to the discretion of Dr. Rapczynski, correct?

MR. GERARDE: Objection to form.

Q. It's something that needs to be done any time information like this comes to light in an investigation?

MR. GERARDE: Objection to form.

A. I think professionally we have an obligation to share the information.

Q. Okay. But my question is, the obligation to share information such as the information contained in Exhibit 3, is a hard and fast obligation? In other words, it's not an obligation that leaves room for someone to -- to use discretion to withhold the information, correct?

MR. GERARDE: Objection to form.

A. Correct.

Q. And in that way, Dr. Rapczynski was required to share the information contained in Exhibit 3 with the parents when he learned of it?

MR. GERARDE: Objection.

A. Again, may be a different set of expectations. From my opinion, yes.

Q. And in your opinion, Dr. Rapczynski did not have the discretion -- he was not in a position where he could say, well, in my judgment there's no reason for me to share this information, I'm just

A. Sure. Example images, 15 year old --
Q. And go slowly enough that the court reporter can get it --
A. Sorry. Sure.
Q. -- please.
A. Fifteen-year-old female eastern Europe type photo, naked female. I think that says that babies who are being sexually assaulted. "EVK has bad stuff. Infants being sexually assaulted."
Q. Did the prosecutor tell you in this conversation that among the -- the child pornography that was on Von Kohorn's computer were photographs or videos of infants being sexually assaulted?
A. I believe so, yes.
Q. Was that the first you learned of that?
A. It was. That was different from what I had learned from the conversations with -- I think it was Detective Carreiro, and I forgot his name from security.
Q. And do you see the last line on the same page, your -- your handwriting?
A. Yes.
Q. It says, "If I was a parent, I would be very concerned"?
A. Yes.

Q. And why did you write that?

A. That was what John Smerga said.

Q. And he was referring to if -- if he was a parent of a child in the Wilton Public Schools he would be very concerned?

A. Yeah. I think that was my question was what was the level of concern for us and for our kids, and that was his response.

Q. I mean, your principal concern in this discussion was understanding what the implications were, potential implications were for parents of school children in the Wilton schools, correct?

A. That's correct.

Q. And that was really the reason for this conversation in the first place, true?

A. I was trying to gather some more information, yeah.

Q. And -- and he informed you when you asked him that, that if he was a parent of a child in the Wilton schools, he would be very concerned, correct?

A. He said if he was a parent, he would be concerned.

Q. Okay. And he was referring to if he was a parent of a child who had been in the care of

Eric Von Kohorn, correct?

A. To the best of my -- yes.

Q. All right. And when he said that, did that cause you to be very concerned?

A. It did. The whole entire episode is very concerning.

Q. Was there anything in particular that you learned in this conversation that caused you to be very concerned for the well-being of the children in the Miller-Driscoll School?

A. Well, I think as an experienced prosecutor, his description of the two types of people who collect child pornography -- pornography, and -- and the understanding that, you know, Eric is somebody that had access to kids and certainly his quote, also the description of the kind of images he was in possession of and, I guess, sharing.

Q. And the images that he was in possession of and sharing included images ranging from infants to -- at least the example said in here, a 15-year-old female, correct?

A. According to John Smerga.

Q. And -- and that was consistent with information you got from other law enforcement representatives?

EXHIBIT 2

IN THE SUPERIOR COURT
JUDICIAL DISTRICT OF STAMFORD
AT STAMFORD

GIRL DOE, PPA MOTHER DOE, ET AL.	:	
Plaintiffs,	:	
-vs-	:	
TOWN OF WILTON, ET AL.	:	
Defendants.	:	OCTOBER 18, 2016

DOCKET NO. FST CV 15 5015035S

DEPOSITION
OF
MOTHER DOE

Pretrial deposition taken before Jolene Isdale, Licensed Shorthand Reporter, License No. 497, and Notary Public in and for the State of Connecticut, pursuant to the Connecticut Practice Book, at Silver, Golub & Teitell, LLP , 184 Atlantic Street, Stamford, Connecticut on October 18, 2016, commencing at 9:13 a.m.

A. The only thing I would say is that "over the recent school vacation," that's not correct. That happened the last day of school when I picked her up. That's what she told me what happened to her that day.

Q. So other than what you've told me just now and I'll talk to you about that in a minute, is the rest of that correct?

MR. SLAGER: Of that bullet point?

MR. GERARDE: Yes.

A. "Mr. Eric wiped me too hard," yes, that's correct.

Q. Let's just go through it and I'll ask you some more questions. The first few words say, "Over the recent school vacation while cleaning her daughter after she had used the toilet, Mother Doe noticed that Girl Doe was irritated down there."

Let's just stop there for a minute. The reference here is that you noticed the irritation while you were cleaning Girl Doe after she had used the toilet. Is that correct?

A. That's not correct. I will tell you how it happened.

Q. Okay.

A. My daughter went to the bathroom. It

was after I picked her up at school. I took her -- she wanted to go to the bathroom. Then she say, "Mommy, Mommy, it hurts." That's what she say to me. "Why, Sweetheart, it hurts?" And I notice -- and that's when I went and I see -- noticed it was irritated.

She couldn't even go to the bathroom because it hurt her. And it was very irritated and that's what happened.

Q. All right. And do you remember what day this was?

A. That was the last day of school.

Q. The last day before vacation?

A. Yes.

Q. So what you're saying is the last day of school before the Christmas vacation in 2012, December of 2012, Girl Doe was home after school and was trying to use the bathroom and she told you that it hurt?

A. Yes. She told me she couldn't go to the bathroom because it hurts.

Q. Do you know if she was trying to go number one or number two?

A. Number one.

Q. All right. And so you were not in the

bathroom with her to start with?

A. No. I was outside waiting for her because I was waiting for her to go give her privacy, but I was outside of the bathroom. And that's when she say, "Mommy, Mommy come inside, it hurts, I cannot go to the bathroom. It hurts." It's irritated. And then I said, "Why, Sweetheart, why is so irritated?" And she told me, "Mr. Eric wiped me too hard."

Q. Where were you when this happened? What bathroom?

A. In the second floor.

Q. Second floor --

A. Bathroom.

Q. -- of your home?

A. Yes. It is a hallway there. The bathroom's right here (indicating). I was waiting outside of the bathroom.

Q. All right.

A. With the door open.

Q. So was there any reason why you were waiting versus just going about your business in the house?

A. Because I just -- I'm a very helpful Mommy.

Q. All right. So you knew Girl Doe was going to use the bathroom. Did she make any complaints about having any pain before she went into the bathroom?

A. She was acting very weird from the moment I pick her up. She was very quiet. She was not herself. She's usually a very happy kid and very outgoing. She tell me about her school day. That day, it wasn't that way. So I notice that she was weird. And then when she went to the bathroom, this is what she told me.

Q. Now, did she use the word "irritated", that it's irritated or did you -- is that just your characterization of what you saw?

A. That's what I saw.

Q. She just said "It hurts"?

A. It hurts.

Q. And you walked in and you looked and what did you see?

A. I see my daughter is very red and she was in pain. She couldn't -- she couldn't go pee pee. So...

Q. All right. I realize this is hard for you and if you want to take a break you can anytime you want, but I need you to give me a description,

if you can, of what you saw because "irritated" can mean a lot of things. "Irritated" can mean it's a different color, it looks red and sore. It can look swollen. It can look like there's skin torn, there's scabs, there's blood, there's -- you know what I mean.

Can you tell me what you remember?

A. It was very, very red. Very, very, red, like swollen. She couldn't go -- she couldn't go to the bathroom because it was very painful for her to go number one that -- it's just, I never saw anything like that. It was very, very red.

Q. Okay.

A. And very -- yeah, it was red. Not even pink. It was very, very red.

Q. Now, in the area where it was red was -- what is the best way you can describe it?

A. It was inside and out.

Q. In the area where if she was going number one that would come out?

A. Yes.

Q. And what about if she was going number two?

A. Around the two --

Q. Sorry. Like, where her rectum is where

the opening if she was going number two, was there any redness down in that area?

A. No, it was in the vagina part.

Q. Okay. I think I know the answer to this question, but I want to ask it anyway, did you by any chance photograph what that looked like?

A. No.

Q. So there's no record at all that would show exactly what that redness looked like?

A. No.

Q. All right. When -- when -- all right, so now tell me, what time of day was this, you say, when you got home from preschool?

A. It was, like, sometime in the afternoon.

Q. When does preschool get out, if you remember?

A. I believe it's around 12, 12:30.

Q. Do you know since that was the last day before Christmas break whether or not that was an early dismissal or was it normal time?

A. I think it was normal time.

Q. And in response to hearing that, what did you do?

A. I immediately called my husband. My

remember? Do you remember who called you?

A. It was not Dr. R. I don't remember her name. It was the Human Resources -- no, I don't remember her name right now. I'm sorry.

Q. Someone from Wilton, though?

A. Yes.

Q. And what was the substance of the call? What did she say to you?

A. She say she needed to talk to us. That's it. And we -- I remember I was in Jill's at that time. And I say, "Father Doe, call them and we can figure out the time that the two of us can be together so we can hear this phone call." And I got home and I saw my husband on the phone. And he look at me, he's in tears. Then I hear on the speaker phone what she said and I was on the floor.

Q. Had Girl Doe had any other problems with Mr. Eric in that, say that 18 months between January of 2013 and August of 2014 or summer of 2014 when this news became public?

A. Well, I wanted -- interesting things happened. Dr. R got a phone call from him when he told me that he wanted to bring Eric to her classroom. He want him to be back because they were short on staff. And I remember the phone call

and I remember -- that happened before I even find out that Eric was going to be arrested -- was arrested. And -- oh, he admitted he lied about taking my daughter to the bathroom.

He got -- I'm never going to forget. He told me, "It was okay -- it was okay to bring him back, that everything was fine. That there was not any problem." He guarantee me that everything would be okay.

So I talked to my husband and we say well, if Dr. R say that after all the investigation, everything is -- nothing happened then it's okay to bring him back. And we agreed to it. Bring him back to her classroom and that was with Mrs. Dawn classroom.

Q. Dawn DiNoto?

A. Dawn DiNoto, yes.

Q. All right. So just so I understand the context of this. Dr. Rapczynski was calling you to ask if it was okay with you if Eric appeared in the classroom where Girl Doe was attending school?

A. Yes, and by that time --

MR. SLAGER: That's his only question.

THE WITNESS: Yes.

BY MR. GERARDE:

Q. And Eric was not going to be providing assistance to Girl Doe specifically. He was going to be with a different student. Am I correct about that?

A. He just told me he was going to be in the same classroom with her.

Q. All right. And am I correct that as of that time you received that call, you had accepted that nothing had happened between Eric and Girl Doe?

A. Before that, before I got that phone call yes, because I trust Dr. R that he did everything. And I trusting that it didn't happen.

Q. And then what about after you got the phone call?

A. After the phone call --

MR. SLAGER: Which phone call?

MR. GERARDE: Let me -- okay. Thank you.

Q. I'm talking first of all about the phone call from Dr. R telling you or asking you would it be all right if Eric was in the classroom with Dawn DiNoto.

A. When he call me --

police, like, I call the police." And she actually went to school and told them. And when they call me and I say, "Well, yes, I did say that. And I shouldn't say it, but I did say it."

Q. And did the Department of Children and Families conduct an investigation at that point?

A. No.

Q. Did you get any counseling in terms of modifying parenting behavior or anything like that?

A. No.

Q. All right. Did you ever attend therapy yourself?

A. I'm in therapy right now.

Q. Who do you see?

A. Karen Olio.

Q. What issues are you working on with Karen Olio?

A. We're working -- right now, I'm currently taking medication for depression and also, we are going there as a couple to make our marriage better. Our marriage was very affected after what happened to Girl Doe. And we just working very hard with her to make things better.

Q. What -- I'm sorry, when did you first begin seeing anyone for therapy?

A. Probably after a year I find out about Girl Doe. Eric, I'm sorry, Eric was arrested for pornography.

Q. All right. So if that happened in the summer of 2014, then we're talking summer of 2015?

A. (Nodding head).

Q. That's when you began seeking therapy?

A. Yes, personally. Yeah.

Q. And have you always seen Karen Olio as your therapist?

A. Only Karen, yes.

Q. What is her last name?

A. Olio.

Q. Spelled how?

A. O-l-i-o.

Q. Where is she located?

A. In Norwalk, Connecticut.

Q. And how often have you seen Karen Olio?

A. Once a week. Sometimes we do every two weeks. Yeah, sometimes every two or sometimes every three weeks. She wanted me to do some homework and do -- you know, do what she's telling me to do and see how things go. And then my therapy, tell me, go back home and do this and try and do -- different things which I wouldn't like to

EXHIBIT 3

STATE OF CONNECTICUT

DOCKET NO. FST-CV15-5015035-S	SUPERIOR COURT
GIRL DOE PPA MOTHER DOE AND FATHER DOE, MOTHER DOE, INDIVIDUALLY AND FATHER DOE, INDIVIDUALLY,	
Plaintiffs,	JUDICIAL DISTRICT
vs.	OF STAMFORD/NORWALK
	AT STAMFORD
WILTON BOARD OF EDUCATION AND TOWN OF WILTON,	
Defendants.	

VIDEOTAPED DEPOSITION OF ANN L. PAUL

DATE: NOVEMBER 30, 2016

HELD AT:

SILVER GOLUB & TEITELL, LLP
184 Atlantic Street
Stamford, Connecticut

- - -

Reporter: Sandra Semevolos, RMR, CRR, LSR #74

BRANDON HUSEBY REPORTING & VIDEO
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249 Pearl Street
Hartford, Connecticut 06103

sexually assaulted Girl Doe?

A. I felt we had information that triggered the DCF report, and that DCF had responded to us that there was no -- that based on whatever they investigated, which we don't really know, that there was no need to go further with this allegation.

Q. Well, you knew in January 2013 that DCF did not investigate either of these complaints; correct?

A. We don't get information back on exactly what DCF has done.

Q. Well, in this case you did.

A. Right. They didn't -- but we don't know when DCF takes a case if they call the family, what they do. We don't get information back on the substance of their investigation.

Q. But you do learn whether there is an investigation?

A. Yes, we do learn that.

Q. And you did learn in response to Exhibit 2, the first DCF report, that DCF was not investigating; correct?

A. Yes, we did know that.

Q. And you did learn in response to Exhibit 3 that DCF was not investigating?

A. Yes.

observed the student in the classroom, so he had knowledge of the student.

Q. Okay. So let's talk about -- so when you say you had sufficient information to conclude it was unlikely Eric von Kohorn sexually assaulted Girl Doe, the information you are referring to is entirely Dr. Rapczynski's investigation?

A. Yes.

Q. All right. And let's talk about what that information was that was uncovered during Dr. Rapczynski's investigation.

The first bit of information was that Eric von Kohorn initially denied ever going into the bathroom with Girl Doe; correct?

A. Yes.

Q. The second bit of information is that when asked a second time, Eric von Kohorn admitted he had lied the first time and actually had taken Girl Doe into the bathroom; correct?

A. Yes.

Q. Dr. Rapczynski, his investigation also concluded that Eric von Kohorn taking Girl Doe alone into the bathroom was a violation of Wilton Public School's toileting protocols as they existed in January 2013; correct?

brought forth about Eric, but at that -- again, at that point, both Dr. Rapczynski and I felt comfortable having Eric in the classroom with children.

Q. And when you say it was kept in mind, how was it kept in mind?

A. Well, I was certainly aware that this had been -- this charge had been brought forth, and Dr. Rapczynski had put forth a schedule for Eric, again, where he would be assigned to a classroom not with the student. He had reviewed with Eric the toileting protocol that was in place at preschool, and had, as I recall, had his verbal assurance that that protocol would be followed closely. So under those circumstances, we felt comfortable having him in the classroom.

Q. And those circumstances were that von Kohorn gave his verbal assurance that he would follow the policy in the future?

A. Yes.

Q. I mean, von Kohorn knew about the policy before; correct?

A. Yes.

Q. And did not follow it; correct?

A. Yes.

Q. So when Dr. Rapczynski reviewed the policy with him, he was reviewing a policy that von Kohorn previously was familiar with?

A. Yes.

Q. And had previously violated?

A. Yes.

Q. And so moving forward, it was your understanding that von Kohorn had given his verbal assurances he would not violate the policy; correct?

A. That's my understanding -- that's as I recall.

Q. Okay. All staff has to give verbal assurances that they are going to follow that policy; correct?

A. Well, it's reviewed with them, and in having it reviewed, we assume that they will follow it. They don't need to, you know, verbally attest that they will follow it, but it's reviewed with them.

Q. And did the fact that von Kohorn verbally said he would follow the policy in the future, did that provide you with some reassurance or comfort?

A. Yes.

Q. And why was it that that was comforting to you that he gave his verbal assurance that he would

Q. Dr. Rapczynski described it in his deposition as a policy that all the staff at Miller-Driscoll was well aware of, and that it was a black and white policy; would you agree with that?

A. Right. I refer to district policy as policy that's gone before the Board of Ed. It wasn't policy in that sense. I call it more a practice that was expected in the preschool.

Q. And it was a -- it was a -- the toileting protocol, as it existed in December 2012 and January 2013, employees did not have the discretion to violate that policy; correct?

A. Correct.

Q. It was a policy they needed to strictly follow?

A. Yes.

Q. And that policy prevented a male paraprofessional from being alone in the bathroom with a female preschool student, among other things; correct?

A. Yes.

Q. All right. And that policy also required that, that if a staff member saw another staff member doing that, that staff member was not to permit it?

MR. GERARDE: Objection to form.

Q. In other words --

MR. GERARDE: Sorry.

Q. Sorry, that was an inarticulate question of the sort I warned you you'd be hearing from me. Let me try again.

The employees of the Wilton Board of Education who worked in the Miller-Driscoll School were not authorized to permit other employees to violate that policy; is that fair?

A. Yes.

Q. And that policy existed, as we talked about earlier, in order to keep kids in the Miller-Driscoll School safe; correct?

A. Safe and respect their privacy.

Q. And those two things in this case go hand in hand; correct?

A. Yes.

Q. And you and others in the district recognized that allowing a male paraprofessional to go into the bathroom alone with a female preschool student when that preschool student was toilet trained would cause a dangerous condition to exist?

MR. GERARDE: Objection to form.

A. I'm not sure I understand "cause a dangerous condition."

Q. Sure, in other words, and I don't mean to use lawyer words with dangerous condition. Let me try again.

The reason that a male paraprofessional was not permitted to be alone with a female preschool student in the bathroom was because for a male paraprofessional to do so would pose a danger to the female preschool student who he accompanied?

MR. GERARDE: Objection to the form.

Q. That's what I mean by "dangerous condition," that's the reason the policy existed; correct?

A. That it might pose a danger, yes, it might.

Q. I mean, policies like that are designed to reduce dangerous situations?

A. Yes.

Q. And a male paraprofessional being alone in the bathroom with a female preschool student is a potentially dangerous situation, a dangerous condition that could pose a threat to the well-being of the female student?

MR. GERARDE: Objection to the form.

A. Yes.

Q. Okay. And the reason staff members were not allowed to permit other staff members to violate

that policy was because of the fact that a violation of that policy could cause harm to the student?

MR. GERARDE: Objection to the form.

Q. That may be repetitive of what I just asked you or just obvious, but I still need to ask it.

Would you agree that that's true

A. Yes.

Q. Okay. And if a -- if a staff member at Miller-Driscoll School became aware that Eric von Kohorn took Girl Doe alone into the bathroom, that staff member would be required to prevent him from doing so?

MR. GERARDE: Objection to form.

Q. Or to take steps to prevent him from doing so?

MR. GERARDE: Objection --

A. Take steps, yes.

Q. And the reason for that again is because of the likelihood of harm that could come to the child in the bathroom if he were permitted to do that.

MR. GERARDE: Objection to form.

A. I didn't know if there was a question that came with that.

Q. Sure. And is that because of the likelihood that if a staff member permitted

von Kohorn to be alone with a student such as Girl Doe in the bathroom, there was a likelihood that harm could come to the student?

A. Yes.

MR. GERARDE: Objection to form.

Q. And that's the reason the policy existed and that everyone was required to follow the policy; correct?

A. Yes.

Q. And individual staff members at Miller-Driscoll in December 2012 and January 2013 were not permitted to deviate from that procedure.

MR. GERARDE: Objection to the form.

Q. Is that correct?

A. Yes.

Q. And one reason they were not permitted to deviate from that procedure is that allowing deviations from that procedure would increase the likelihood of harm coming to children who were students at the school.

MR. GERARDE: Objection to form.

Q. Is that correct?

A. It could, yes.

Q. Okay. Have you ever personally spoken to Eric von Kohorn?

EXHIBIT 4

DOCKET NO.: FST-CV15-5015035-S

GIRL DOE PPA MOTHER DOE AND FATHER DOE, MOTHER DOE, INDIVIDUALLY AND FATHER DOE, INDIVIDUALLY,	SUPERIOR COURT JUDICIAL DISTRICT OF STAMFORD/NORWALK
v.	
WILTON BOARD OF EDUCATION AND TOWN OF WILTON	July 7, 2016

DEPOSITION OF FRED RAPCZYNSKI

Taken before Gina M. Ruocco, LSR #516, Court Reporter and Notary Public within and for the State of Connecticut, pursuant to Notice and the Connecticut Practice Book, at Law offices of Silver Golub & Teitell, 184 Atlantic Street, Stamford, Connecticut on Thursday, July 7, 2016, commencing at 2:49 p.m.

BRANDON HUSEBY REPORTING & VIDEO
249 Pearl Street
Hartford, Connecticut 06103
(860)549-1850

DCF?

A. Because after my -- in my conversation with the father on Friday, January 4th, he had indicated that he would like a third party opinion, and I had indicated that even though I -- at that point in time did not have any suspicion, that I would make the referral to DCF.

THE VIDEOGRAPHER: Off the record. The time is 4:13.

(Whereupon, a recess was taken.)

THE VIDEOGRAPHER: This is the beginning of the meeting number two. We're back on the record. The time is now 4:22.

Q. I think before we went off the record I was asking you why you made the report to DCF dated January 7th, 2013, and you indicated that it was because the father wanted another opinion?

A. Correct.

Q. All right. Did you ever feel you were obligated to make a report?

A. At -- at that point in time I did not feel that I had reasonable suspicion of any neglect or abuse that would warrant it, but agreed since the father wanted a third party, or in reference to a second party, to make that referral.

A. That was reported to me by the mother, yes.

Q. And I'm wondering whether those reports, in your view, gave you a basis to have a reasonable suspicion that perhaps there had been inappropriate touching by Von Kohorn.

A. It gave me enough suspicion to find out from my staff if there was any opportunity for that to have occurred.

Q. Did it give you enough suspicion to make a report to DCF?

A. It gave me enough to agree with the father that he wanted a third party, and that I would make the referral based upon his desire to have a third party investigate.

Q. But the parents' reports to you about what Girl Doe had reported, combined with their reports about their daughter's injuries, it's your testimony that that was not enough to cause you a sufficient degree of suspicion to make a report to DCF of suspected child abuse; is that right?

A. Correct.

Q. Okay. It did give you enough suspicion to want to do your own investigation internally, which is what you did?

A. Correct.

Q. All right. And then based on that investigation, you determined -- just looking at Exhibit 2, you determined that the information that you learned did not support the child's claims?

A. Correct.

Q. And -- and that process of investigating took place between January 3 and January 7, 2013?

A. January 3 and January 4.

Q. And it concluded on January 4?

A. It -- in a meeting with the father, he indicated his desire to have a third party, and I indicated that I would make a referral, then, to DCF.

Q. Okay. And that was something you told the father on January 4, correct?

A. Correct.

Q. And then you did eventually make the referral -- referral as you call it, but the report of suspected child abuse to DCF on January 7th, 2013, correct?

A. Correct.

Q. And did you -- did you do anything else in terms of investigating the allegations or anything else in connection with this matter in

A. DCF does what -- what DCF does, and I don't have -- I assume that they do an investigation. They do what they need to do.

Q. Well, don't you think if DCF did an investigation you would know about it?

A. Not necessarily.

Q. Well, were you ever aware of any investigation by DCF?

A. No, but that's not unusual.

Q. Okay. Well, do you have reason to believe that DCF performed an independent investigation?

A. I have no knowledge.

Q. All right, that's what I'm asking.

(Whereupon, the One page response from DCF was marked as Plaintiff's Exhibit Number 2A, and the One page report from DCF Dated 1/9/13 was marked as Plaintiff's Exhibit Number 3A for Identification.)

And we marked -- I think we marked in this deposition as 2A -- as 2A -- 2A was the response that you received from DCF.

A. That they dated the 8th?

Q. Correct. Dated January 8th, 2013. That was the response following your January 7, 2013

of --

A. That was my assumption, yes.

Q. Okay. So she contacted you directly, correct, by telephone?

A. I believe it was by phone.

Q. And what did she tell you?

A. She indicated to me that there was a day that she was dropping her daughter off and the daughter had to use the bathroom, and she asked Mr. Eric to take her into the building so that she could use the bathroom.

Q. Okay. And that was new information to you --

A. That was new.

Q. -- as of January 7, right?

A. Correct.

Q. Okay. And was that information significant to you?

A. Yes.

Q. Why?

A. Because it brought into question opportunity.

Q. All right. Which was the focus of your prior inquiry?

A. Correct.

Q. And what did you do once you learned that information?

A. Talked to Eric, talked to a staff member who Eric said that he had spoken to when he was going into the building to bring the girl to the bathroom. And based upon confirmation that Eric did bring the girl into the building and brought her to the bathroom, filed a follow-up DCF referral.

Q. Okay.

A. Which this one I did feel that there was reason to suspect the possibility.

Q. And -- and this one you filed already on January 8th, 2013, correct?

A. Correct.

Q. Which would have been with -- certainly within 24 hours of -- of you learning this new information?

A. Yes, and the report was within 48 hours also.

Q. Okay. And the written report that's marked now as Exhibit 3, which is your second report to DCF --

A. Yes.

Q. -- as you said, this report, you -- you submitted because you felt you had reasonable

suspicion, therefore, were required to report it?

A. Correct.

Q. And this was the second time you had talked to Eric Von Kohorn about the alleged incident, correct?

A. Yes.

Q. And in this -- in this interview, he corroborated what Mother Doe had told you in terms of escorting the daughter from the car into the school building, correct?

A. Correct.

Q. And he also admitted that he took her into the bathroom alone?

A. Correct.

Q. Alone, correct?

A. Correct.

Q. All right. And that was different from what he had told you before?

A. It was.

Q. All right. Because before he told you he had never been in the bathroom with her?

A. Correct.

Q. And that he had never assisted her in any way in toileting?

A. Correct.

Q. All right. Mr. Von Kohorn also told you that although he went into the bathroom, he did not go into the bathroom stall?

A. Correct. There's two stalls, but there was -- he said he stayed outside the stall.

Q. And did he tell you anything else?

A. That he had told another staff member that he was bringing her into the bathroom, but I could not confirm that with the staff member that he had indicated.

Q. Did he identity the staff member?

A. Yes, he did.

Q. Who was it?

A. Karen Farber.

Q. Who was Karen Farber?

A. Speech and language pathologist in the preschool.

Q. And he indicated that she was aware he was taking -- he was aware she was taking Girl Doe into the bathroom?

A. He said that he told Karen that he was bringing her into the bath -- into the building so that she could go to the bathroom.

Q. And did he -- according to Exhibit 3, Mr. Von Kohorn also told you that he had informed

that's reflected in Exhibit 3, your second DCF report, tell me what else you remember about your discussion with him.

The first thing you mentioned is that you told him it was -- it was --

A. He violated practice.

Q. He violated the -- the Wilton public school policy by bringing her in, correct?

A. The practice of males not -- everybody knows the practice, males don't -- he violated that.

Q. And that's a practice that is applied uniformily across the board, correct?

A. For the -- I can speak for the preschool, yes.

Q. In other words, it's a requirement?

A. It is a requirement.

Q. All right. It's a -- a practice that's strictly prohibited with no exceptions?

A. Correct.

Q. And it was not within Mr. Von Kohorn's discretion to set aside that practice and -- and take this child into the bathroom, correct?

A. Correct.

Q. And similarly, if he had informed another staff member that he was going to be taking

a female preschool student, it would be a -- a violation of the same procedure, practice procedure for that staff member to permit him to do that?

A. A staff member would not have permitted that.

Q. And in fact, the staff member would not have the discretion to permit him to do that?

A. Correct.

Q. So -- and you informed Von Kohorn of that?

A. I did.

Q. And how did he respond?

A. He made a mistake.

Q. Okay. And did you have any other discussion with Von Kohorn at that point?

A. Other than, again, just reiterating that that's not to be done. I did follow up with reassigning so that he was not going to have contact with the girl anymore.

Q. Why did you do that?

A. Because I now had suspicion that something could have happened, and discretion to -- it's the appropriate thing to do in response until further information was forthcoming.

Q. And once you had information that led

Q. When you received the letter from DCF dated one day after your report, and I'm referring now to Exhibit 3A which is the letter of 1/9/2000 -- 2013, you had no reason to believe they had done any independent investigation at all, correct? We just talked about that.

A. I had no reason to believe that there was anything done.

Q. All right. And so my question to you is, as the director of the preschool program, were you satisfied that the parents' request for an independent investigation into the matter had been fulfilled?

A. I did what I needed to do. I can't pass judgment on whether or not DCF has done what they needed to do. It's --

Q. Other than preparing the reports, Exhibit 2 and 3, did you do anything else to investigate whether Von Kohorn sexually assaulted Girl Doe?

A. I did not personally do anything else.

Q. And are you aware of anyone else doing anything else?

A. Not that I'm aware of.

Q. And as the director of preschool

role, I -- but I want to -- I want to be more narrow in my question and in your answer.

So my question is, with respect to your investigation of whether Girl Doe was sexually assaulted by Von Kohorn in a Miller-Driscol School bathroom, your role in investigating that in your view ended as of January 9, 2013, correct?

A. Yes.

Q. And I think you said before that after January 9, 2014 you did not take any further investigatory steps, correct?

A. Correct.

Q. And that's why you didn't, is because you viewed your role as being completed?

A. Correct.

Q. As of January 9, 2013, however, you were unsure as to whether Von Kohorn had assaulted Girl Doe or not, correct?

A. There was no definitive conclusion, correct.

Q. All right. Meaning maybe she had been assaulted, maybe she had not been assaulted, you were unable to tell?

A. Correct.

Q. Did you take any steps to ensure that

It's -- it's an assumption -- if I go around assuming that I can't rule something out, and then not conduct myself in my position the way I need to, I'm not going to get too much done.

I mean, it's -- it's clear that he lied. That I can conclude. I can't conclude that he did anything else.

Q. You can't, but you have reason to be suspicious that he did.

A. And I filed with DCF.

Q. Well, I'm not talking about DCF, I'm talking about you. At the conclusion of your portion of the investigation, you already said at the conclusion of your portion of the investigation you had reason to be suspicious that he had assaulted Girl Doe.

A. I said that I didn't have any reason to suspect that he did or that he didn't.

Q. Is it your testimony now that you had no reason to suspect that he did --

A. I didn't say that.

Q. I thought that's just what you said, which is a big change from what you said a little while ago.

Let me ask -- just ask a question.

A. Go ahead.

Q. You would agree, based on the information you gathered in January of 2013, that you did have reason to be suspicious that Von Kohorn had sexually assaulted Girl Doe?

A. I had reason to believe that there was suspicion, yes.

Q. And having that suspicion performing your investigation, you learn that Von Kohorn lied to you not once but twice, correct?

A. Correct.

Q. And -- and knowing that, and knowing that you had reason to be suspicion [sic], don't you think it would have been appropriate for you to in your mind further investigate whether Von Kohorn had sexually assaulted Girl Doe?

A. What I concluded was that I needed to provide supervision, maybe more active supervision of Eric.

Q. To ensure that he didn't sexually assault any students?

A. To ensure that he was following the policies and adhering to the practice.

Q. And to ensure that he wasn't sexually assaulting any other students?

MR. GERARDE: Objection to form.

A. No, to ensure that he was following the practice.

Q. Well, is the reason you wanted him to have additional supervision to --

A. Because he had lied.

Q. Let me finish my question.

Is the reason -- is the reason that you determined he required additional supervision because you had reason to be suspicious about whether he had sexually assaulted a student and you knew that in the aftermath of that suspicion he had lied to you during your investigation?

A. The criteria for suspicion caused me to make a referral. My continued concern focused on his truthfulness. And therefore, we put into place provisions to make sure that it was appropriate adherence to practice, policies.

Q. What practice, policies?

A. Toileting, supervision of the kids, staff not being alone with the kids.

Q. You -- you had -- you took specific steps of additional supervision of Von Kohorn that related to ensuring he wasn't toileting the kids, is that what --

A. That he was not toileting females. That's -- I mean, that was already in place, but going from one teacher to another, making sure that all of the supervising teachers were -- had a heightened awareness that we needed to -- to make sure that everybody was following the rules.

Q. I mean, all of the teachers already knew that, right?

You made sure that all the teachers already knew that, right?

A. Yes.

Q. Before -- before January of 2013?

A. Yes.

Q. So what additional supervision did you require of Eric Von Kohorn after January 8, 2013, if any?

A. Other than what I've stated, none.

Q. And -- and what you've stated is you've alluded to some additional steps to ensure that he was following the toileting policy. What were those additional steps?

MR. GERARDE: Objection to the form.

MR. SLAGER: Well, let me just withdraw the question.

teacher is that there had been some concerns raised about Von Kohorn's interaction with another child, correct?

A. Correct.

Q. Do you remember anything else that you told the -- his new assignment?

A. I don't.

Q. All right. Do you remember any steps, other than what you've already identified, and -- and -- which I think is none, so let me rephrase the question.

Do you remember any steps that were taken after January 8, 2013 to provide additional supervision of Eric Von Kohorn?

A. No.

Q. I will ask this question again, but if I've been asking about 2009 I intend to ask about January 2013. You understand that, sir?

A. I understand.

Q. Okay. Where I've said January of 2009, you understand that I'm referring to January of 2013?

A. I understand.

Q. So I don't need to go back and ask all of those questions, do I?

A. No.

Q. I will, however, at your counsel's request, ask the most recent question.

So after January 8 of 2013, did you take any steps to provide additional supervision of Eric Von Kohorn's interactions with preschool students at Miller-Driscol school?

A. Other than reassigning, no.

Q. And the reassignment was not an increase in the level of supervision, correct, it was just a different classroom?

MR. GERARDE: Objection to form.

A. It was a different classroom.

Q. Was there any additional supervision involved in the fact that he was being reassigned to a different classroom, or was it just a different room?

A. It was a different room.

Q. So there was no additional supervision relating to his new assignment, correct?

MR. GERARDE: Objection to form.

A. Correct.

Q. And were you comfortable as the director of preschool services for the Wilton public schools, knowing what the allegations were as of January

when you get into the building, the staff have to take the kids to the bathrooms. So there is lots of movement and lots of traffic going to and from the bathrooms.

Q. And on the subject of opportunity, you would have expected that if Von Kohorn took Girl Doe alone into the bathroom, then other staff members would have seen that happening?

MR. GERARDE: Objection to form.

THE WITNESS: I would assume that there was a low possibility that someone could -- would be able to bring a child into the bathroom and not be seen.

BY MR. SLAGER:

Q. In other words, it would have -- you would have expected that if Von Kohorn had taken Girl Doe alone into the bathroom, another staff member would have witnessed it?

MR. GERARDE: Objection to form.

THE WITNESS: I don't know if I would make the assumption. It certainly would be a possibility that he --

BY MR. SLAGER:

Q. I am trying to understand your -- I didn't mean to interrupt you?

A. Okay.

EXHIBIT 5

STATE OF CONNECTICUT

DOCKET NO. FST-CV15-5015035-S	SUPERIOR COURT
GIRL DOE PPA MOTHER DOE AND FATHER DOE, MOTHER DOE, INDIVIDUALLY AND FATHER DOE, INDIVIDUALLY, Plaintiffs,	JUDICIAL DISTRICT OF STAMFORD/NORWALK AT STAMFORD
VS.	
WILTON BOARD OF EDUCATION AND TOWN OF WILTON, Defendants.	

VIDEO DEPOSITION OF: JAMES MARTIN

DATE: MARCH 9, 2017

HELD AT:

Silver, Golub & Teitell, LLP
184 Atlantic Street
Stamford, Connecticut

- - -

Reporter: Jennifer Gruseke, LSR #537

just to see if there was maybe teacher meetings or something where somebody would be in the office.

Q. And you didn't connect?

A. I did not connect.

Q. Were you able to leave voicemails or was it --

A. I didn't -- I wouldn't have left voicemails with something like this, except to say, you know, that I need to speak with him, but I don't -- I don't think I -- I don't think there was a voicemail to be left at that time. Normally, Patty who was his assistant is who would normally answer the phone.

Q. All right. So you were -- when you were calling, you were always calling Dr. R?

A. Right.

Q. And then whoever answers the phone on his number that would be the phone -- that's the phone that you called?

A. Right. It would always be or usually it would be Patty who would answer that.

Q. All right. And then there came a time when you did connect after New Years?

A. Yes.

Q. What do you remember about that?

timeline in your mind of when it was approximately you first --

A. Sort of approximately. Generally probably sometime in January.

Q. Okay.

A. Shortly after January 3rd.

Q. All right. And I don't need a specific date, but it would have been right around that time?

A. Yes. Yeah.

Q. And who did you hear it from?

A. Again, I don't know if I can -- with certainty. So it was either probably Dr. Rapczynski or possibly her classroom teacher.

Q. Okay.

A. Most likely it was probably Dr. Rapczynski.

Q. And did Dr. Rapczynski tell you about that in sort of a formal setting or in a casual setting, or can you tell me what the context was of that conversation?

A. Again, I don't know, you know, with certainty. But it -- I believe it was in a, you know, probably private conversation with he and I either in his office or in my office.

Q. Okay. And before you had that conversation, did Dr. Rapczynski send you an e-mail telling you he

about that. These are questions we've already asked Dr. Rapczynski and Dr. Smith.

I understand from their testimony that there was not actually a written policy in effect regarding the toileting protocol as of December 2012, correct?

A. Yes.

Q. But there was an understood policy in effect at the school, correct?

A. Yes.

Q. And that policy was that no adult staff member was ever to be alone in the bathroom with a preschool student?

A. Uh-huh.

Q. Correct?

A. Yes.

Q. And also that no male staff member was ever to assist a female preschool student into the bathroom, correct?

A. Yes.

Q. And those are policies that, although they weren't written, those were polices that were well-known among the staff at Miller-Driscoll, correct?

A. Yes.

Q. And those were protocols the staff was required to follow at all times?

A. Yes.

Q. And, in addition, it was the policy of Miller-Driscoll as of December 2012 that another staff member was not to permit a fellow staff member to go alone into the bathroom with a preschool student, correct?

A. Yes.

Q. And that a -- a staff member at Miller-Driscoll was not allowed to permit a male staff member to take a female preschool student into the bathroom alone, correct?

A. Yes.

Q. And, again, although it wasn't a written policy, it was a well-understood policy that was in effect in December 2012?

A. Yes.

Q. And staff members at Miller-Driscoll were required to follow those policies?

A. Yes.

Q. Okay. So at some point you learned that -- well, let me take this back. Let me ask it a different way.

Did you ever learn whether Eric von Kohorn went alone into the bathroom with Girl Doe?

MR. GERARDE: Objection to form.

You can answer if you understand.

A. Yes.

Q. Okay. Did you learn that he did?

A. Yes.

Q. All right. And when he did, that was a violation of school policy, correct?

MR. GERARDE: Objection to form.

A. Yes.

Q. And if other staff members knew he was doing that, they would have violated school policy by allowing him to do that, correct?

A. Yes.

Q. Okay. And was it concerning to you to find out that von Kohorn had violated the policy in that way and taken Girl Doe alone into the bathroom, particularly when considered in light of her reports?

A. In light of the reports, yes.

Q. And tell me why that was concerning to you, in light of her reports.

A. Well, the report and the -- you know, the policy that one shouldn't do that. So it called things into question, raised more questions.

Q. And I guess it raised even more questions knowing that he initially denied doing that and it was later learned that that denial was untrue?

A. Yes.

A. I can't -- I can't say one way or the other on that actually.

Q. Okay. By the way, those -- the policies that were in place about staff members going into the bathroom with students, the purpose of those policies you would agree was to protect -- protect children, correct?

A. Sure, yes.

Q. In other words, those policies reflect an understanding by the school that allowing an adult staff member to be alone in the bathroom with a preschool student poses a potential threat to the well-being of the preschool student. That's the reason the policy exists, correct?

A. Yes.

Q. And, similarly, the policy that prevented a -- an adult male from being in the bathroom alone with a female preschool student, that policy existed in order to reduce the potential threat to the well-being of students --

A. Uh-huh.

Q. -- that would be related to having an adult male alone in the bathroom with a female student, correct?

A. Uh-huh. Yes.

Q. Okay. In other words, those policies reflect an understanding by the school that allowing adults to be alone in the bathroom with preschool students posed a potential threat to the well-being of those students? I think that's the same question.

A. Yes. Yeah.

Q. All right. You mentioned that -- let me withdraw the question.

So you learned that Dr. Rapczynski was looking into the matter and he later was able to determine that -- that Eric von Kohorn had been alone in the bathroom with Girl Doe, correct? We already talked about that.

A. Yes.

Q. Did you ever learn anything else about what Dr. Rapczynski learned when he looked into the matter?

A. No.

Q. Did you ever learn whether Dr. Rapczynski concluded that von Kohorn had or had not assaulted Girl Doe?

A. That Dr. Rapczynski had come to that determination?

Q. Yeah. Let me ask a better question. I'll withdraw it.

acceptable to withhold that information, that is the information that von Kohorn had initially denied about being alone in the bathroom with Girl Doe and later it was discovered that he had been alone in the bathroom with Girl Doe? Was it -- was the school permitted to withhold that information from the parents?

MR. GERARDE: Object to the form.

A. I don't know. I can't answer that.

Q. You knew that information, correct?

MR. GERARDE: Objection to form.

Q. You knew that -- back in January of 2013, you knew that initially von Kohorn had denied being in the bathroom and then later admitted he had been in the bathroom, correct?

A. I don't know if it was January, but I found out at some point that there was a discrepancy, yes.

Q. You found out sometime in early 2013?

A. Uh-huh. Yes. Yeah.

Q. And did you notify the parents of that discrepancy?

A. No.

Q. Why not?

A. Because I didn't think it was my place to do that. It was --

Q. Whose place did you think it was?

well-being would have been a question, but the well-being would have also been, you know, sort of observed by how she -- what she was like, how did she behave, and what her reactions were like after -- after the allegations were revealed.

Q. Do you have an opinion about whether Eric von Kohorn assaulted Girl Doe?

A. Do I have an opinion, no.

Q. I trust that's something you've spent time thinking about?

A. Yes.

Q. And after -- and you've probably spent many hours thinking about that question, correct?

A. Uh-huh. Yeah. Yeah.

Q. And after spending many hours thinking about it, you do not have an opinion about it?

A. No.

Q. In other words, I'm correct when I say that?

A. Yes.

Q. All right. That's my fault.

Did you ever have an opinion about whether Eric von Kohorn assaulted Girl Doe?

A. Did I ever have an opinion, no.

Q. And the --

A. I've learned over the years --

MR. GERARDE: Wait for a question.

THE DEPONENT: Oh.

MR. GERARDE: He just asked you if you had an opinion. You said, "No." That's enough.

Q. What have you learned over the years?

A. That sort of --

MR. GERARDE: Not to run on with his answers.

A. That opinions can be -- just be -- can -- can form kind of ideas and then drive you in a direction that might not allow you to look objectively in that situation. So I try to maintain objectivity, I guess.

Q. But one can maintain objectivity and still form opinions, correct?

A. Sure. In this case, though, I didn't.

Q. Understood. In other words, you remained objective in this case, but you never formed an opinion one way or another about whether von Kohorn actually assaulted Girl Doe?

A. Uh-huh, yes.

Q. Okay. And is the reason you never formed an opinion because there were some factors in your mind that suggested that it had happened and other factors that suggest in your mind that maybe it hadn't

happened? Is that why, or is there some other reason?

A. I think it was just sort of being -- maintaining an openness to I guess the evidence, one way -- one way or another. And I wasn't -- there was never a certainty about it. So I remained uncertain about it.

Q. Okay. And after January 2013 you continued to see Eric von Kohorn at the school, correct?

A. Yes.

Q. On a daily basis?

A. Probably not daily because I wasn't working there every day, but when I was there and he was there on the same day, most times I'd probably see him.

Q. And that would have been true throughout that winter/spring semester 2013 as well as the following school year, correct?

A. Yeah. When did he leave?

Q. That would have been the summer of 2014.

A. '14.

Q. So the 2013 headed into the 2014 school year, you would have seen him on a regular basis as well?

A. Yes.

Q. And when you saw him, did you wonder about the -- about those allegations involving Girl Doe?

A. Of course.

Q. I would think so.

A. Yes.

Q. And was it a -- was it difficult to see him in school and work in the same place with him knowing that there was this unresolved issue in your mind about whether he had sexually assaulted Girl Doe?

A. For me, I don't think it was difficult. It certainly was, you know, a different sort of relationship, felt different. The relationship in my mind felt different.

Q. Had there ever been a time before Eric von Kohorn where you had worked with a colleague on a regular basis who you suspected may possibly have sexually assaulted another -- or a child?

A. In a different workplace?

Q. Correct.

A. I'm going through the workplaces in my head. No.

Q. So von Kohorn was the first person who you ever worked with who -- where you -- where there was an open question in your mind about whether he had sexually assaulted a child?

A. Yes.

Q. And what was that experience like for you?

A. It was -- it was a bit unnerving to be honest.

Q. Yeah.

A. To have that, you know, level of -- yeah, suspicion aroused about somebody who I -- who I worked with and somebody who I held in pretty high acclaim for what I witnessed of how he interacted with the kids.

Q. When you -- after January of 2013 when you continued to work with von Kohorn the rest of that semester and then the following year, did you find yourself paying particular attention to watching the way he interacted with children knowing that you had the suspicion in your mind that he may have sexually assaulted Girl Doe?

A. I -- I think I sort of, you know, was -- when I was in a room with him I watched him anyway I think. Did I -- did I look differently? I suppose I probably -- I probably did, sure.

Q. Okay. And did you ever notice anything when you were watching him during that time after January of 2013 that sort of raised your antenna or raised your suspicion about any other improper conduct?

A. No actually.

Q. Okay. After January 2013 do you ever remember having any other discussions with Dr. Rapczynski about

whether von Kohorn had assaulted Girl Doe?

A. No.

Q. Up until the time of his arrest at any time?

A. In between that time, I don't believe so.

Q. During that time frame between January of 2013 and the time of von Kohorn's arrest, did you ever have any discussions with anyone else, either in the Wilton Public School system or Miller-Driscoll School specifically, about von Kohorn and his contact with Girl Doe?

A. Sure.

Q. Do you remember anything about it?

A. Not specifically, but, I mean, there were times when people, you know, would -- would talk and would -- and they would say I guess the same as I. They wondered about the possibility.

Q. I would think other staff members would have some of the same reactions that you've described today, and that was why I asked the question.

A. Uh-huh.

Q. Were there times where there was sort of casual conversations, more informal or more formal, where other teachers or members of the staff at Miller-Driscoll would say to you -- would bring up von Kohorn in the context of, you know, those suspicions

that had come up in -- in early 2013 and discuss that with you?

A. Yes. Yeah.

Q. And do you remember anyone specifically who you had conversations with about that topic?

A. No. No. Not specifically.

Q. Did -- do you remember in your conversations with those Miller-Driscoll staff members whether they expressed similar feelings to those that you articulated this morning about it being in some ways a little bit uncomfortable working with a person who you knew had been suspected of that but there was an open question in your mind as to whether he had actually assaulted Girl Doe?

A. Yeah. I think there was -- at times there were, you know, sort of occasional conversations around just kind of the discomfort and, you know, what to believe and how to manage one's feelings.

Q. Right. Right.

A. Uncertainty about it.

Q. And I take it that the notion of wondering whether von Kohorn had in fact sexually assaulted Girl Doe or not, that was a question that was an open question not only in your mind but in other people who you discussed von Kohorn with at the school during that

time period between January 2013 and the time of his arrest?

A. Yeah.

Q. And in some of those conversations people would say -- and I'm paraphrasing obviously, but things like, you know, "I wonder if he did it or he didn't do it," things like that?

A. Yes. Yeah.

Q. Okay. Did you ever hear any staff members express opinions, strong opinions, either that he had done it or that he had not done it?

A. No. No.

Q. So everyone -- so everyone who you discussed the issue with was -- as far as you could tell, was of similar mind to you which was it was very much an open question?

A. I don't know if I would phrase it as an open question, but uncertainty. But if that's the same thing as an open question, then -- then I guess yes.

Q. Okay.

A. Yes.

Q. Okay. Let me take a look at Exhibit 38 for a moment.

Just so I understand, Exhibit 38 is what?

A. A developmental history.

EXHIBIT 6

DCF-2122b
02/12
(Rev.)

State of Connecticut
Department of Children and Families

LETTER TO MANDATED REPORTERS

Date: 1/8/2013

Fred Rapczynski
217 Wolfpit Rd.
Winton Pre-School
Wilton, CT 06897

Re: Wilton Pre-School
[redacted]

Dear Fred Rapczynski:

The Child Abuse & Neglect Careline received your report on 1/8/2013. Thank you for reporting your concerns in regards to this family.

We wish to advise you of the following:

The reported information has not been accepted for a DCF response for the following reason(s):

Does Not Meet Statutory Definition of Abuse/Neglect/At Risk

As a mandated reporter I want to remind you that Connecticut General Statues Sec. 17a-101c requires all mandated reporters submit a written report (DCF 136 "Report of Suspected Abuse/Neglect") to the Department of Children and Families within 48 hours after an oral report.

You can receive a blank DCF-136 form by calling the Careline at (800) 842-2288 or go to the DCF web site at http://www.state.ct.us/dcf/, click on Forms, select DCF Forms, and select the DCF-136 Child Abuse reporting form.

If you have not submitted the DCF-136 reporting form, please send by mail or fax the DCF–136 form to the Child Abuse and Neglect Careline at 505 Hudson St., Hartford, CT. 06106, fax number (860) 560-7070.

If you have submitted the DCF-136 reporting form, you have met your legal requirements as a mandated reporter. Thank you. This letter serves only as a reminder.

Please feel free to contact me if you have any questions with regards to this decision.

Sincerely,

Linda Harris-Neckles

EXHIBIT 7

IN THE SUPERIOR COURT
JUDICIAL DISTRICT OF STAMFORD
AT STAMFORD

GIRL DOE, PPA MOTHER DOE, ET AL.	:	
Plaintiffs,	:	
-vs-	:	
TOWN OF WILTON, ET AL.	:	
Defendants.	:	OCTOBER 18, 2016

DOCKET NO. FST CV 15 5015035S

DEPOSITION
OF
FATHER DOE

Pretrial deposition taken before Jolene Isdale, Licensed Shorthand Reporter, License No. 497, and Notary Public in and for the State of Connecticut, pursuant to the Connecticut Practice Book, at Silver, Golub & Teitell, LLP , 184 Atlantic Street, Stamford, Connecticut on October 18, 2016, commencing at 12:27 p.m.

therapy from him. It was more prescription. I was getting prescriptions from him and he lived -- by that time I had moved to Connecticut, he lives -- you know, his practice was so far away, that I went to my primary care doctor and she took over the management of the prescriptions.

Q. Who was your primary care doctor?

A. Dr. Wei, W-e-i.

Q. And where does she practice?

A. Norwalk.

Q. And she's an internist?

A. Yes.

Q. And what is your current prescription?

A. The same, Wellbutrin and Trazodone.

Q. Wellbutrin for depression, Trazodone for sleep?

A. Yes.

Q. So have you seen -- have you seen any other therapist since Dr. Neuman? I'm not taking anything away from Dr. Wei, I'm talking about a specialist?

A. Karen Olio.

Q. So you continued on with Dr. Wei and then you added Karen Olio?

A. Right. Dr. Wei just management -- just

manages prescription. Karen Olio is not a physician, she's a therapist.

Q. When did you begin seeing her?

A. Maybe a year ago. That's a guess. I'm really not sure.

Q. All right. And would that be the first the therapist you saw after December 21, 2012?

A. Yes.

Q. How often do you see Karen Olio?

A. It's sporadic. Sort of as was Mother Doe was outlining, sometimes I see her by myself, sometimes with Mother Doe. It's not regular. If I were to put a cadence to it, I would say, you know, once a month maybe, or maybe once to twice a month.

Q. And when you see her, what issues do you work on?

A. Well, I mean, if we're working, if we're talking about when I'm with Mother Doe, we're working on specifically marital issues and problems that we have in our marriage. When it's by my -- when I'm by myself, I guess you would say I'm working on my half, of what's contributing to marital issues.

Q. And if I could ask you for some self-reflection, what do you believe is your

half -- what are you contributing to the marital issues?

A. Well, you know, I think -- I think part of the problem is that, you know, following this event, I think that Mother Doe and I have different ways of dealing with things and I think that that has put a wedge between us. I'm much more closed off. I tend to want to deal with pain by myself. And, you know, therefore, I don't think I've been as available to her, you know, as somebody to -- you know, a shoulder to cry on and sort of commiserate with. So I work on being more open with feelings.

Q. And do you blame Mother Doe at all for what happened to Girl Doe?

A. No, absolutely not.

Q. Do you blame yourself at all?

A. No, I don't blame myself for what happened to her, but I do blame what I consider to be some naivety on my part for allowing certain situations like the return of Mr. Von Kohorn into her classroom. And that's another thing that I work on with Karen is the sort of the feelings of guilt of, you know, not -- not having open eyes in what was going on and being able to most

effectively protect my daughter from harm.

Q. How many times do you think that Eric was in Girl Doe's classroom as a result -- you're talking about the time when Dawn DiNoto's class needed an aide because of short staffing and so Eric -- you were called and asked if Eric could be allowed back in?

A. Mother Doe was called, yeah.

Q. Did you participate in that decision at all?

A. Yes, we spoke about it together, yeah.

Q. So even though Girl Doe had made that statement about "Eric wiped me too hard," it was still okay with you that he was in the classroom?

A. Yes, at that point, there had been no new news about Eric since that time. And since I had come to the conclusion that the investigation done by Rapczynski was a good one and that, you know, the result was that it didn't happen that was my belief at the time.

So it was actually a quick discussion between Mother Doe and I where it was -- you know, she doesn't -- she didn't like him, you know, but that's -- as time has passed, that's probably not an issue. And since he wasn't a danger to her, we

had no issue with him being in the class at the time.

Q. Well, you would agree that even though you weren't updated on the interview with Eric Von Kohorn, Dr. Rapczynski did tell DCF that Von Kohorn admitted being in the bathroom, but denied being in the stall?

A. I knew that after we agreed to, sure.

Q. And DCF still determined that it was not a case it was going to open and investigate even knowing what Von Kohorn had followed up with that yes, I was in the bathroom, but I didn't go in the stall; is that right?

A. That DCF -- that DCF decided not to file? Yeah, I actually -- I'm not sure of that part. I think in my mind, you know, the crucial piece of information on that second report was that he was in the bathroom after I had been told he was not in the bathroom. As far as DCF's decision not to take it any further, I don't even think I've contemplated that.

Q. All right. And so what you're saying is if only you had been told that you would not have agreed to Von Kohorn being in the bathroom? I'm sorry, Von Kohorn being in Dawn DiNoto's

class --

A. Absolutely.

Q. -- the next year?

A. Absolutely. I would have not agreed to that.

Q. And I'm sorry for not remembering an earlier answer, but did you -- do you have a thought as to how many times Von Kohorn was in Dawn DiNoto's class?

A. I don't have a thought at all. You mean, once -- in other words, once he was -- once we agreed to let him in because they were short staffed, how often he was in the class?

Q. Right.

A. I don't know.

Q. So you don't know if it was only one time or if it was 15 times?

A. I don't know.

Q. And are there any other communications with Kevin Smith that you had about this event that you haven't told me about later on in the fall after it all came to light? Any follow-up? Anything recent? Anything like that?

A. I'm drawing a blank on that. I'm suspecting by your line of questioning that I have;

EXHIBIT 8

2013 WL 3388898
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford–Norwalk.
Charlotte BLACK

v.
TOWN OF WESTPORT et al.

No. FSTCV116008867S.
|
June 17, 2013.

Attorneys and Law Firms

Patrick J. Filan LLC, Fairfield, for Charlotte Black.

Ryan Ryan DeLuca LLP, Stamford, for Town of Westport et al.

Opinion

KEVIN TIERNEY, Judge.

***1** The plaintiff, Charlotte Black, was injured during practice as a member of the Staples High School gymnastics team in the Staples High School gym. The injury occurred at 3:45 p.m. on February 27, 2009, after the students were discharged from the school day. Staples High School is the public high school for the Town of Westport. The five defendants are the Town of Westport, as the owner of the real property, the Westport Board of Education, Donald O'Day, as chairman of the Westport Board of Education, Martin Lisevick, as athletic director of Staples High School, and Melissa Zygmont, an employee of the Westport Board of Education and the coach of the Staples High School gymnastics team. The four-count lawsuit alleges violations of ministerial duties and violations of discretionary duties. There is no claim of defective equipment or defective premises.

The operative complaint is the March 6, 2013 Amended Complaint (# 132.00). The allegations of the complaint that are pertinent to the underlining factual claims are as follows:

"13. During gymnastics practice, at about 3:45 p.m., while in the field house at Staples High School the defendant ZYGMONT singled the plaintiff out from the rest of her teammates and directed her to go off by herself in an area of the gymnasium separate and apart from the rest of her teammates to attempt and practice a gymnastics maneuver known as the Yamashita vault.

14. The plaintiff had never attempted nor practiced the Yamashita vault before and had never performed the Yamashita vault in any meet or competition.

15. The defendant ZIGMIONT did not provide guidance, instruction, or supervision of the plaintiff when she attempted the Yamashita vault on this occasion.

16. The defendant ZIGMIONT was not present when the plaintiff practiced the Yamashita vault. In fact the defendant ZIGMONT was in another area of the practice facility coaching team members performing floor routines."

"19. Shortly after being sent off on her own to practice the Yamashita vault the plaintiff, CHARLOTTE BLACK, attempted the Yamashita vault as she had been directed to by the defendant ZYGMONT but was unable to complete it and landed on her head and neck suffering severe personal injuries as hereinafter set forth."

The court is applying the well known standards for summary judgments without stating those standards in this Memorandum of Decision. *Covello v. Darien,* Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number FST CV 08–5008909 S (October 22, 2010, Tierney, JTR) [51 Conn. L. Rptr. 40]; *Forrest v. Sotheby's International Realty, Inc.,* Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number FST CV 011–6010200 S (January 9, 2013, Tierney, JTR).

The parties have an initial disagreement as to whether the plaintiff is alleging violations of a ministerial duty and/or violations of a discretionary duty or both. The defendants' November 14, 2012 Motion for Summary Judgment (# 124.00) is silent on the nature of the duty. The defendants' March 7, 2013 Memorandum of Law states: "Whereas is the case herein it is apparent from the complaint that breach of a specific ministerial standard is being alleged, then it may be concluded from the pleadings that the plaintiff is not alleging a discretionary act." (# 134.00, p. 10.) The plaintiff, on the other hand, in her November 14, 2012 Memorandum of Law states: "As a matter of law, the Defendants' alleged conduct in the present was discretionary in nature." (# 125.00, p. 6 & 7.) This court must determine whether the negligent acts are claimed to have violated discretionary duties or ministerial duties or both.

***2** "The determination of whether official acts or omissions are ministerial or discretionary is a question of fact for the fact finder." *Beach v. Regional School District Number 13,* 42 Conn.App. 542, 553, 682 A.2d 118 (1996); *Gordon v. Bridgeport Housing Authority,* 208 Conn. 161, 165, 544 A.2d 1185 (1988). The operative complaint is the March 6, 2013 Amended Complaint (# 132.00). It is in four counts. The First Count alleges negligence against the Town of Westport and the Westport Board of Education. The Second Count alleges negligence against Donald O'Day, the chairman of the Westport Board of Education. The Third Count alleges negligence against Melissa Zygmont, the employee of the Westport Board of Education and the coach of the Staples High School gymnastics team. The Fourth Count alleges negligence against Martin Lisevick, the director of athletics for the Westport Board of Education. The plaintiff Melissa Zygmont is referred to in the pleadings by different names; Zigmont, Zigmiont, and Zygmont. The court will refer to this defendant as Melissa Zygmont. The court assumes that the spelling variations are typographical in nature. The plaintiff did not frame her complaint by alleging separate counts for violations of ministerial duties against each of the named defendants and a separate count for violations of discretionary duties as against each of the named defendants. Each of the four counts contains separate allegations of negligence as to each of the four groups of defendants, each restated and contained in paragraph 29 of the four counts. The allegations of negligence in the First Count against the Town of Westport and the Westport Board of Education are found are in paragraphs 29 a) through l). The allegations of negligence in the Second Count against Donald O'Day are identical to the First Count and found in the Second Count in paragraph 29 a) through l). Both paragraphs 29 g) state: "failed to perform the ministerial duty of providing adequate supervision at all times during gymnastics practices held within the confines of the Staples High School field house to ensure that every identifiable member of the gymnastics team, including the plaintiff, Charlotte Black, would not be exposed to dangerous and hazardous conditions, such as the conditions described above." Each of the four sub-paragraphs 29 h) through k) allege: "failing to follow the defendants' gymnastics safety policy." Each sub-paragraph then sets forth the language of four different safety policies. Those same five sub-paragraphs g), h), i), j), k) and l) are realleged in the Third Count of negligence against Melissa Zygmont, the coach of the Staples High School gymnastics team and in the Fourth Count of negligence against Martin Lisevick, the athletic director for Staples High School. The court concludes from these allegations that the plaintiff is claiming negligence against all five defendants for breaches of ministerial duties.

Sub-paragraphs 29 a), b) and c) allege as follows: "a) failed to exercise reasonable supervision by mandating that gymnastics practices be conducted in a reasonably safe fashion;" "b) failed to prohibit members of the gymnastics team from performing dangerous maneuvers without appropriate safeguards and protection in place;" and "c) failed to properly train [the] Melissa Zygmont regarding how to safely conduct gymnastics practices without creating a dangerous and hazardous condition for the students, including the plaintiff, Charlotte Black." These allegations of sub-paragraphs 29 a) and b) are common to all four counts against all five defendants. Allegations of sub-paragraph 29 c) are found in the First Count against Town of Westport, and the Westport Board of Education, the Second Count against Daniel O'Day and the Fourth Count against Martin Lisevick. The equivalent allegation in the Third Count against Melissa Zygmont in sub-paragraph 29 c) is as follows: "failed conduct gymnastics practices without creating a dangerous and hazardous condition for the students, including the plaintiff, Charlotte

Black." From these allegations the court concludes that the plaintiff has alleged negligence by all five defendants for breaches of discretionary duties.

***3** The court therefore concludes that each of the four counts as against each of the five defendants alleges in a single count violations of both ministerial duties and discretionary duties.

"Although municipalities are generally immune from liability in tort, municipal employees historically were personally liable for their own tortious conduct ... The doctrine of governmental immunity has provided some exceptions to the general rule of tort liability for municipal employees. A municipal employee ... has a qualified immunity in the performance of a governmental duty, but he may be liable if he misperforms a ministerial act, as opposed to a discretionary act." *Purzycki v. Fairfield,* 244 Conn. 101, 107, 708 A.2d 937 (1998). "Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature." *Gauvin v. New Haven,* 187 Conn. 180, 184, 445 A.2d 1 (1982) "Ministerial acts are those that are performed in a prescribed manner without the exercise of judgment ..." *Lyon v. Andrews,* 211 Conn. 501, 506, 559 A.2d 1131 (1989). General Statutes § 52–557n(a)(1) provides: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties."

Ministerial refers to duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. *Violano v. Fernandez,* 280 Conn. 310, 318, 907 A.2d 1188 (2006); "The hallmark of a discretionary act is that it requires the exercise of judgment ..." *Martel v. Metropolitan District Commission,* 225 Conn. 38, 48–49 (2005). A ministerial duty to act in the prescribed manner may follow a discretionary determination as to whether to act. *Mills v. The Solution, LLC,* 138 Conn.App. 40, 52–53 (2012); *Pluhowsky v. New Haven,* 151 Conn. 337, 347–48, 197 A.2d 645 (1964). In this case the plaintiff is claiming that "A policy or directive such as the defendants' gymnastic team safety policy curtails whatever judgment and discretion would ordinarily be associated with the performance of a particular duty and renders the duty ministerial. See *Beach,* 42 Conn.App. 542, 553–54, 682 A.2d 118 (1996)." Plaintiff's March 7, 2014 Memorandum of Law (# 134.00, p. 11).

In the event that the court determines that the actions of the defendants were discretionary in nature, the court must consider whether one of three exceptions apply: "The immunity from liability for the performance of discretionary acts by a municipal employee is subject to three exceptions or circumstances under which liability may attach even though the act was discretionary: first, where the circumstances make it apparent to the public officer that his or her failure would be likely to subject an identifiable person to imminent harm ... second, where a statute specifically provides for a cause of action against a municipality or municipal official for failure to enforce certain laws ... and third, where the alleged acts involve malice, wantonness or intent to injury, rather than negligence." *Doe v. Board of Education,* 76 Conn.App. 296, 300, 819 A.2d 289 (2003). Based upon a review of the parties' Memoranda of Law and their oral argument, only the first exception is relevant in this case ... likely to subject an identifiable person to imminent harm."

***4** The court will first consider a violation of a ministerial duty. Paragraphs 29 h) through k) allege four separate sections of the "defendants' gymnastics safety policy." Each of the four counts contain the same four allegations. Each of the four counts contain the same allegations in subparagraph 12. Subparagraph 12 alleges as follows: "That policy provided and directed in pertinent part that a. members of the Staples High School gymnastics team were to 'perform only those skills and techniques as instructed and/or supervised by your coach'; b. team members 'practice only when your coach is present' "; c. "that team members be supervised and monitored by properly trained and qualified spotters; and d. that spotters in place before team members attempting any stunt or routine as directed by the coach." An interrogatory answer furnished by the defendant, Donald O'Day, dated November 8, 2012 (# 134.00) was before the court: "37. At the time of the events complained of herein did any policies, protocols, guidelines or similar documents exist concerning any of the following materials: a. Safety of participants in interscholastic sports teams; b. Supervision of athletes in competing on interscholastic sport teams; c. Safety of participants on any gymnastics team or clubs at Staples High School; and d. Supervision of participants on any gymnastics teams or clubs at Staples High School." The interrogatory was answered: "Yes. See attached rules of the National Federation of State High School Associations for gymnastics." Attached to the interrogatory answer is a one page document entitled "*GYMNASTICS* " (# 134.00 p. 38). This one-page document contains one paragraph with three sentences and then thirteen numbered paragraphs follow. It appears that the allegations in paragraph 12 of the complaint were drawn directly from the language of this thirteen numbered paragraph document. Paragraph 12a of the complaint is a direct quote from paragraph

numbered 2. Paragraph 12b of the complaint is a direct quote from paragraph numbered 11. Paragraph 12c of the complaint is drawn from paragraph numbered 12 and paraphrases portions of paragraph numbered 12. Paragraph 12d of the complaint is a direct quote from the second sentence of paragraph numbered 12. The introductory three sentence paragraph to these thirteen numbered paragraphs is as follows: "When a person is involved in any athletic activity, an injury can occur. One should be aware the information presented in these safety guidelines is to inform the athlete of proper techniques and inherent dangers involved with gymnastics. There is a chance of broken bones, muscle and soft tissue and back injuries, which could lead to some form of paralysis. Not all potential injury possibilities in this sport are listed, but athletes should be aware that fundamentals, coaching and proper safety equipment are important to the safety and enjoyment of the sport."

The court has carefully reviewed the attached rules of the National Federation of State High School Associations for gymnastics attached to Interrogatory 37 of the November 8, 2012 interrogatory response. This court cannot find that any paragraph is directed to a coach. Each of these thirteen numbered paragraphs are directed to the gymnastic athlete. The court further notes that the Interrogatory 37 does not directly ask about the policies, protocols, guidelines or similar documents relating to the policies of Staples High School and/or the Westport Board of Education or the policies of any coaching duties for Staples High School's interscholastic teams. The court further notes that the one-page document attached to Interrogatory 37 does not contain any introductory information promulgated by the National Federation of State High School Associations for gymnastics. The document contains no page numbers. There are no indications what pages or language preceded or followed this one attached page. The context of this one page was not furnished to this court.

*5 The two essential allegations of negligence are: (1) that the coach, Melissa Zygmont, was not present when she instructed Charlotte Black to practice the Yamashita vault knowing that she had never attempted such a gymnastics maneuver prior and (2) the coach failed to provide spotters to assist Charlotte Black in performing the Yamashita vault in order to protect Charlotte Black from injury in the event that she did not perform the vault completely, fully and safely. Two of the thirteen paragraphs of the National Federation of State High School Associations for gymnastics relate to the above two claims of negligence: Paragraph numbered 11, "Practice only when your coach is present," and Paragraph numbered 12, "Stunts and/or routines can be dangerous if not spotted correctly while learning or not performed correctly. You must understand the requirements of a spotter and have spotters in place before attempting any stunt or routine as directed by your coach."

These paragraphs are directed toward the athlete only. By plain reading the language of this attached one-page is not directed toward the coach. An argument can be made that the intention of these paragraphs is directed to the coach and therefore the coach must be present when practice occurs and the coach must arrange for spotters to be present when a gymnast is learning or practicing a new gymnastic maneuver.

The court therefore finds that it is a material issue of fact as to whether or not there is a policy in effect directed toward the coach of the Staples High School gymnastics team.

Connecticut law has not provided a bright line rule determining if a municipal action is ministerial. One case describes the mere opening of a door by a school employee as a discretionary act. *Colon v. City of New Haven,* 60 Conn.App. 178, 185, 758 A.2d 900 (2000). The inability to offer definite guidelines is not limited to Connecticut courts. "It would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved the driving of a nail. *Ham v. County of Los Angeles,* 46 Cal.App. 148, 162, 189 P. 462 (1920). Our Supreme Court has noted the dissatisfaction with the distinction between ministerial and discretionary. It has refused to adopt a governmental immunity distinction based on the planning and operational levels due to the Connecticut legislature adopting the ministerial-discretionary common law test in Gen.Stat. 52–557n. *Violano v. Fernandez, supra,* 280 Conn. 327.

Cases that have found the duties to be ministerial have looked for the existence of a written policy or directive. *Kolaniak v. Board of Education,* 28 Conn.App. 277, 281–82, 610 A.2d 193 (1992) (a bulletin issued to all custodians requiring walkways to be inspected and kept clean on a daily basis provides a sufficient basis to establish a breach of ministerial duty for an icy sidewalk fall).

An example of the many trial court decisions noting the requirements of proving a ministerial duty is as follows: "The plaintiff ... presents no documentation regarding any ordinances, regulations, written directives or policies within the City of Milford or the Milford Board of Education mandating the manner in which the Foran High School cheerleading squad's team

practices were to be conducted, supervised or controlled, or as to what type of matting should be used." *Pierce, PPA et al. v. City of Milford et al.,* Superior Court, judicial district of Ansonia/Milford at Milford, Docket Number CV 10–6003528 S (January 13, 2012, Arnold, J.).

***6** In 2002 a change in this written policy or directive requirement occurred, when a municipality was held liable for negligence of its tree warden for the plaintiff's injuries. There were no municipal charter provisions, rules or ordinances that directed the duties of the tree warden. The general statutes on the subject were vague. Gen.Stat. § 23–59. The jury's interrogatory answers found that the municipality failed to establish that the tree warden's duties to inspect, maintain and remove the tree were discretionary in nature. The Appellate Court acknowledged that there were no written policies but it held that the general directions given by the municipality to the tree warden "is always the same, look at the tree, make a determination. Is it a safety concern? Is it a priority?" This testimony was sufficient to uphold the jury's findings of a breach of a ministerial duty. *Wisniewski v. Darien,* 135 Conn.App. 364, 375 (2012). This testimonial method without proof of written policies, may be enough to sustain the plaintiff's burden of demonstrating that a municipal duty is ministerial.

Melissa Zygmont's February 12, 2013 deposition filed with this court contains sufficient oral evidence of material issues of fact or to whether there was a policy in effect requiring the gymnastics coach to perform ministerial duties. (# 134.00, pages 40–42, 46–53, 93.)

That conclusion is supported by a recent trial court decision. The plaintiff was injured at an after school gymnastics team practice in the public school gym. *Ritchie v. Milford,* Superior Court, judicial district of Ansonia/Milford at Milford, Docket Number CV 06–5001722 (May 27, 2010, Hiller, J.). "The court has reviewed the evidence submitted by the parties, and finds that genuine issues of material fact remain with regard to whether such a policy was properly in place at the time of Richie's injuries." "Other evidence provided to the court that is relevant to any such policy is simply confusing and sometimes contradictory." "In short, the court has reviewed all the evidence submitted by the parties and finds that genuine issues of material fact remain in dispute with regard to the alleged policy. These issues include but are not limited to (1) whether there was a policy in place mandating that only custodians were to set up the school's gymnastics floor; (2) whether such a policy applied only when the floor was to be constructed for meets, or extended to all instance in which the floor was to be assembled; (3) who was authorized to institute and/or modify any such policy; and (4) what the substance of any such policy was at the time of the incident. The resolution of these issues of fact is necessary in order to determine whether the duties allegedly breached by the defendants were ministerial or discretionary. As such, the court is unable to grant any party judgment as a matter of law at this juncture." *Id.*

The plaintiff Charlotte Black's complaint does not allege separate counts directed to violations of ministerial duties and violations of discretionary duties. The plaintiff has combined both legal theories into a single count. Summary judgment can only be directed toward an entire count of the complaint, not to portions of a count. "There is no appellate authority as to whether a court can permit summary judgment against a party relative to individual allegations within a single count of a complaint. At the trial court level there is a split of authority on the issue. A review of the decisions finds that the majority of the cases do not allow a party to eliminate some, but not all, of the allegations of a single count through a motion for summary judgment ..." *Fuller v. Manchester Obstetrics & Gynecology Associates,* Superior Court, judicial district of Hartford at Hartford, Docket Number HHD CV 07–5012261 S (June 3, 2011, Robaina, J.); *Telesco v. Telesco,* 187 Conn. 715, 718–19, 447 A.2d 752 (1982); *Teachers Insurance and Annuity Association of America v. Water Pollution Control Authority of the Town of Wilton;* Superior Court, judicial district of Stamford/Norwalk of Stamford, Docket Number FST CV 05–4007101 S (November 15, 2007, Tobin, J.).

***7** The court will not discuss the applicability of the identifiable person imminent harm exception to a claimed violation of a discretionary duty, since the court already has found a material issue of fact as to the ministerial duty allegations.

Neither the parties' Memoranda nor their oral argument differentiated between the five defendants on the issues raised in this Motion for Summary Judgment. The court therefore will not separately analyze the issues as to each of the five defendants. The lead defendant is the gymnastics coach, Melissa Zygmont. The court denies the Defendant, Melissa Zygmont's, November 14, 2012 Motion for Summary Judgment (# 124.00). This same result is applicable to the other four defendants, since no party argued different standards and facts as to the other four defendants.

The court denies the Defendants' November 14, 2012 Motion for Summary Judgment (# 124.00) filed by all five defendants;

the Town of Westport, Westport Board of Education, Donald O'Day, Melissa Zygmont and Martin Lisevick.

All Citations

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End of Document

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Fairfield.

Jane DOE
v.
WESTPORT BOARD OF EDUCATION et al.

No. CV085015710S.
|
Feb. 29, 2012.

BELLIS, J.

FACTS

*1 On May 8, 2008, the plaintiff, "Jane Doe,"[1] filed a five-count complaint against the defendants, Peter Eramo, Elliot Landon (the superintendent), John Brady (the principal), and the Westport board of education (the board).[2] The plaintiff alleges the following facts in all five counts of her seventh amended complaint (amended complaint) against the defendants.[3] The plaintiff is a former student of Staples High School (Staples) in Westport, Connecticut. In May 2003, Eramo, one of the plaintiff's teachers at Staples, allegedly, sexually abused, sexually assaulted and sexually exploited the plaintiff. At the time of the incident, the plaintiff was a minor.

Counts one and two of the amended complaint are directed against Eramo. In count three, the plaintiff alleges, *inter alia,* that the board is vicariously liable pursuant to General Statutes § 52–557n,[4] as: (1) The principal negligently failed to investigate a complaint, as required by the board's staff/student nonfraternization policy, which alleged Eramo had inappropriate contact with the plaintiff (nonfraternization complaint);[5] and (2) the superintendent negligently failed to provide Eramo with a copy of a sexual harassment policy[6] created by the board. In count three, the plaintiff alleges a direct cause of action against the board for negligence under § 52–557n, based on the allegation that the board failed to provide Eramo with a copy of the sexual harassment policy, a common-law negligence claim against the superintendent based on the allegation that the superintendent failed to provide Eramo with a copy of the sexual harassment policy, and a common-law negligence action against the principal, as he negligently failed to investigate the nonfraternization complaint, as required by the nonfraternization policy.[7]

In count four, the plaintiff alleges that the board is liable under a vicarious liability theory, as Eramo, the superintendent and the principal were acting in the course of their employment and in furtherance of the interests of the board. In count five, the plaintiff seeks indemnification from the board on behalf of Eramo, the superintendent and the principal pursuant to General Statutes § 10–235.[8]

On September 1, 2011, the defendants filed a motion for summary judgment as to counts three and four on the following grounds: (1) The doctrine of governmental immunity shields the defendants from any liability; (2) the defendants owed no duty of care to the plaintiff; (3) the defendants' alleged conduct was not the proximate cause of the plaintiff's injuries; and (4) the defendants are not liable for the intentional or criminal acts of Eramo. While the defendants move for summary judgment as to count three on the ground that the defendants are not liable for the intentional or criminal acts of Eramo, the defendants

only argue this ground as to count four in their memorandum. Furthermore, the board moves for summary judgment as to count five on the ground that § 10–235 does not provide a direct cause of action against the board.

*2 In support of their motion, the defendants submitted certified deposition transcripts of: (1) Lisabeth Comm, the department chair of the English department at Staples; (2) the plaintiff's mother; (3) the plaintiff; (4) Karyn Morgan, the administrator of pupil services and the sexual harassment officer at Staples; (5) the superintendent; (6) Eramo; and (7) the principal. Additionally, the defendants submitted the following documents: (1) Performance evaluations of Eramo dated September 21, 2001, October 4, 2001, October 30, 2001, October 9, 2002, October 28, 2002, November 7, 2002; (2) a memorandum sent from Morgan to Eramo dated November 8, 2001; (3) a letter sent from Gloria Rakovic, the former principal, to Eramo dated May 28, 2002; (4) a memorandum sent from Morgan to Eramo dated February 25, 2003, regarding a sexual harassment investigation; (5) a resignation letter from Eramo dated February 26, 2003; (6) a letter from the superintendent to Eramo dated March 6, 2003, confirming receipt of the resignation letter; (7) a memorandum sent from the principal to Eramo dated April 8, 2003; (8) a memorandum sent from Eramo to the principal dated April 10, 2003; (9) the nonfraternization policy; (10) the sexual harassment policy; (11) a professional development and evaluation plan for public schools in Westport; and (12) appendix A and appendix B of performance expectations for administrators and supervisors for public schools in Westport.

On November 1, 2011, the plaintiff filed a memorandum in opposition to the defendants' motion for summary judgment, with thirty-seven exhibits. The relevant evidence will be discussed below as necessary. On November 14, 2011, the defendants filed a reply memorandum. The defendants' motion for summary judgment was heard at short calendar on November 14, 2011.

On November 14, 2011, the defendants filed a motion to strike two exhibits attached to the plaintiff's memorandum in opposition to the defendants' motion for summary judgment. On December 6, 2011, the plaintiff filed a memorandum in opposition to the motion to strike. The motion to strike was scheduled for argument on January 17, 2012. On January 13, 2012, however, the parties mutually agreed not to present oral argument and requested that the court consider the motion to strike based on their respective memoranda.[9]

DISCUSSION

"Practice Book § 17–49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party ... The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Grimm v. Fox,* 303 Conn. 322, 329, 33 A.3d 205 (2012). "[A] summary disposition [must] ... be on evidence which a jury would not be at liberty to disbelieve and ... where ... the trier of fact could not reasonably reach any other conclusion than that embodied in the [summary judgment]." (Internal quotation marks omitted.) *Golek v. Saint Mary's Hospital, Inc.,* 133 Conn.App. 182, 194, 34 A.3d 452 (2012).

*3 "[B]efore a document may be considered by the court in support of a motion for summary judgment, there must be a preliminary showing of [the document's] genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be. The requirement of authentication applies to all types of evidence, including writings ... Documents in support of or in opposition to a motion for summary judgment may be authenticated in a variety of ways, including, but not limited to, a certified copy of a document or the addition of an affidavit by a person with personal knowledge that the offered evidence is a true and accurate representation of what its proponent claims it to be." (Citation omitted; internal quotation marks omitted.) *Romprey v. Safeco Ins. Co. of America,* 129 Conn.App. 481, 493, 21 A.3d 889, cert. granted in part on other grounds, 302 Conn. 934, 28 A.3d 991 (2011). If a party, however, fails to object to unauthenticated documents submitted by an adverse party, the court, within its discretion, may consider the evidence. *Collins v. Tabacco Plowing, LLC,* Superior Court, judicial district of New Haven, Docket No. CV 09 5026150 (August 29, 2011, Alexander, J.) (52 Conn. L. Rptr. 502, 503 n. 5).[10]

Count Three

I

The defendants contend that the plaintiff's claims of negligence are barred by the doctrine of governmental immunity, as the conduct alleged involves discretionary governmental acts. In particular, the defendants argue that the nonfraternization policy and the sexual harassment policy do not contain any ministerial duties with which the defendants failed to comply. The plaintiff counters that the nonfraternization provision requires the principal to investigate any alleged violation of the nonfraternization policy. Therefore, the plaintiff argues that "this language imposes a ministerial duty upon [the principal] to investigate all complaints of behavior that is prohibited by the [nonfraternization policy]." In addition, the plaintiff asserts that the sexual harassment provision imposes a ministerial duty upon the defendants to distribute the sexual harassment policy to its teachers, which includes Eramo. As a result, the plaintiff argues that the court should deny the defendants' motion, as the alleged acts of negligence constitute ministerial duties.

"By the passage of § 52–557n the legislature abandon[ed] the common-law principle of municipal sovereign immunity and establish[ed] the circumstances in which a municipality may be liable for damages." (Internal quotation marks omitted.) *Coe v. Board of Education,* 301 Conn. 112, 117, 19 A.3d 640 (2011). Section 52–557n provides in relevant part: "(a)(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties ... (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by ... (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." Specifically, a board of education is a political subdivision for purposes of § 52–557n. *O'Connor v. Board of Education,* 90 Conn.App. 59, 66, 877 A.2d 860, cert. denied, 275 Conn. 912, 882 A.2d 675 (2005); *Gaizler v. Pagani,* Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket No. CV 05 4004807 (May 24, 2007, Tobin, J.) (43 Conn. L. Rptr. 518).

***4** The language of § 52–557n(a) demonstrates the legislature's intent to abrogate governmental immunity that the common law provides to municipalities with respect to vicarious liability. *Spears v. Garcia,* 66 Conn.App. 669, 678, 785 A.2d 1181 (2001), aff'd, 263 Conn. 22, 818 A.2d 37 (2003); see also *Pane v. Danbury,* 267 Conn. 669, 677 n. 9, 841 A.2d 684 (2004), rev'd in part on other grounds, 294 Conn. 324, 984 A.2d 684 (2009) (holding that a plaintiff may also set forth a direct cause of action for negligence against a political subdivision of the state pursuant to § 52–557n). "[W]hile a municipality is generally liable for the ministerial acts of its agents, § 52–557n(a)(2)(B) explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Internal quotation marks omitted.) *Coe v. Board of Education, supra,* 301 Conn. at 117. "The hallmark of a discretionary act is that it requires the exercise of judgment ... In contrast, [m]inisterial refers to a duty [that] is to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Id.,* at 118; see also *Kolaniak v. Board of Education,* 28 Conn.App. 277, 281, 610 A.2d 193 (1992) ("[e]very voluntary physical act necessarily requires some sort of preceding thought process and decision by the actor" but that does not necessarily transform a ministerial function into a discretionary one).

While § 52–557n does not authorize an action against individual municipal employees, a plaintiff may allege common-law negligence claims against such employees. *Coe v. Board of Education, supra,* 301 Conn. at 120–21. The doctrine of qualified immunity, however, may shield municipal employees from liability for their own torts. *Purzycki v. Fairfield,* 244 Conn. 101, 107, 708 A.2d 937 (1998). "[G]enerally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts ... Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature." (Internal quotation marks omitted.) *Coe v. Board of Education, supra,* at 121. The analysis under a qualified immunity defense, as applied to an individual municipal employee, is the same for a governmental immunity defense, as applied to a municipality. *Id.*

Under § 52–557n, if a board of education creates a policy or procedure requiring a school employee to act without the use of discretion, a court may conclude that such act or omission constitutes a ministerial duty. *Kolaniak v. Board of Education, supra,* 28 Conn.App. at 281–82. Moreover, "[t]he total failure to discharge a required duty is considered a ministerial act not subject to immunity." (Internal quotation marks omitted.) *Doe v.. Madison,* Superior Court, judicial district of New Haven,

Docket No. CV 09 5032869 (July 6, 2011, Woods, J.) (52 Conn L. Rptr. 216, 220); see also *Podgorski v. Pizzoferrato,* Superior Court, judicial district of Hartford, Docket No. CV 07 5010288 (October 7, 2009, Peck, J.) (48 Conn. L. Rptr. 613, 615) ("if a policy exists that mandates that a school official take a certain action which he or she then fails to do, a court may conclude that a ministerial duty exists as a matter of law"). "Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder ... there are cases where it is apparent from the complaint." (Internal quotation marks omitted.) *Greenfield v. Reynolds,* 122 Conn.App. 465, 470, 1 A.3d 125, appeal denied, 298 Conn. 922, 4 A.3d 1226 (2010). As a result, "[w]hether conduct is ministerial or discretionary may be determined as a matter of law." *Smart v. Corbitt,* 126 Conn.App. 788, 800, 14 A.3d 368, appeal denied, 301 Conn. 907, 19 A.3d 177 (2011).

***5** Here, the court must determine whether the defendants were engaging in ministerial or discretionary conduct. In particular, the plaintiff argues that the defendants failed to act as required by the nonfraternization provision and the sexual harassment provision. Therefore, a resolution of these issues requires the court to interpret the language of the respective policies.

An interpretation of a board of education policy or procedure is governed by principles of statutory construction. See *Honulik v. Greenwich,* 293 Conn. 698, 710, 980 A.2d 880 (2009) ("[p]rinciples of statutory construction govern our interpretation of [a] town policy"). Our Supreme Court has stated that definitive words, such as "must" or "shall," ordinarily express actions of a mandatory nature. *Francis v. Fonfara,* 303 Conn. 292, 302, 33 A.3d 185 (2012). Additionally, the use of the word "will" rather than "may" suggests that an act is intended to be more than permissive or advisable. *Metropolitan District Commission v. AFSCME, Council 4, Local 184,* 237 Conn. 114, 120, 676 A.2d 825 (1996); compare *Summit Packaging Systems, Inc. v. Kenyon & Kenyon,* 273 F.3d 9, 12 (1st Cir.2001) ("the word 'will' ... a word commonly having the mandatory sense of 'shall' or 'must ...' " [internal quotation marks omitted]), citing Black's Law Dictionary (6th Ed.1991); see also *Cantrell v. Rumman,* United States District Court, Docket No. 04 C 3041 (N.D.Ill. February 9, 2005) (recognizing that the word "will" is mandatory); see also *Bellucci v. Avedesian,* Rhode Island Superior Court, Docket No. KC 2004–0456 (November 8, 2006) ("the word 'will' should not be given a permissive meaning where it is used with reference to any right or benefit to anyone, and the right and benefit depends upon giving a mandatory meaning to the word" [internal quotation marks omitted]).

A

An interpretation of the nonfraternization policy is necessary to determine whether the alleged negligence of the principal constitutes ministerial or discretionary conduct. The nonfraternization policy prohibits the following behavior between a teacher and a student: "[F]lirting and bantering with sexual overtones, dating, courting or engaging in a personal relationship on or off campus that is sexual motivated or nuanced, having any physical sexual contact or sexual intercourse with any student." Specifically, the nonfraternization provision states that "[c]omplaints ... should be reported to the [p]rincipal; who will investigate to determine whether a violation has occurred." (Emphasis added.) Based upon this language, the principal is not permitted to exercise discretion to determine whether an investigation should be conducted if a complaint alleges behavior prohibited by the nonfraternization policy. Rather, the principal is required to investigate any alleged violations of that policy. This interpretation is further supported by the deposition testimony of the principal, who testified that an investigation would be required if a parent complained that a teacher contacted her daughter by email to meet the teacher outside of school.[11] Accordingly, the plaintiff's evidence demonstrates, as a matter of law, an alleged violation of a ministerial duty.

***6** In their reply memorandum, the defendants argue that a complaint regarding an alleged violation of the nonfraternization provision does not "in and of itself ... impart a ministerial duty." According to the defendants, it is a predicate discretionary determination by the principal that a complaint falls within the scope of the nonfraternization policy, which triggers any purported ministerial duty to investigate. In support of their argument, the defendants rely on *Bonington v. Westport,* 297 Conn. 297, 999 A.2d 700 (2010). In that case, our Supreme Court stated that "even when the duty to respond to a violation of law is ministerial because that specific *response* is mandated, the predicate act—determining whether a violation of law exists—generally is deemed to be a discretionary act. A ministerial duty on the part of an official often follows a quasi-judicial determination by that official as to the existence of a state of facts. Although the determination itself involves the exercise of judgment, and therefore is not a ministerial act, the duty of giving effect, by taking appropriate action, to the determination is often ministerial ." (Emphasis in original; internal quotation marks omitted.) *Id.,* at 309.

In the present case, the defendants argue that the discretionary predicate act is a determination by the principal that the nonfraternization complaint alleges conduct prohibited by the nonfraternization policy. Even if the court assumes, *arguendo,* that this is a discretionary determination within the rule set forth in *Bonington,* the principal's argument fails, as a discretionary predicate act does not, by itself, bar the plaintiff's claim. Instead, the plaintiff may overcome this issue if she proves that the principal made the initial determination. While it is ultimately the plaintiff's burden to prove that the principal made the discretionary determination that triggered the ministerial duty to investigate, the principal, within the context of a summary judgment motion, has the burden of demonstrating the nonexistence of an issue of material fact. The principal, however, fails to submit any evidence demonstrating that he did not make the initial determination. As a result, the principal fails to satisfy his burden and therefore, summary judgment is inappropriate.

The defendants further argue that "Superior Courts ... have held that the manner in which an investigation is conducted, and the determination of whether a violation exists, necessarily implicates the exercise of judgment and discretion afforded governmental immunity." Furthermore, the defendants contend that "any disciplinary action under the [nonfraternization] policy is predicated upon a determination of whether a violation in fact occurred ... [and][t]here exists ... no evidence ... that [the principal] made the predicate determination that Eramo had violated the [nonfraternization policy] ..." The issue, however, is not whether the principal conducted an inadequate investigation, failed to discipline Eramo, or failed to determine that Eramo violated the nonfraternization policy. Instead, the plaintiff alleges that the principal failed altogether to conduct a required investigation. Consequently, the defendants' arguments are misplaced.

B

*7 Next, the court must determine whether the superintendent and the board were engaging in ministerial or discretionary conduct by failing to distribute the sexual harassment policy to Eramo. The sexual harassment provision states: "A copy of this policy *will* be distributed to all current employees and to all new employees at the time of hire. It *will* also be distributed annually to all employees and students." (Emphasis added.) Based upon this clear language, it is required, without the exercise of judgment, that all employees and students are to be provided with a copy of the sexual harassment policy. Thus, the total failure to distribute the sexual harassment policy constitutes a ministerial act not entitled to immunity.

This conclusion, however, does not end the court's analysis. The sexual harassment provision does not specify who will distribute the policy. At first glance, it would appear that the board might have the duty to distribute it. In their opposition memorandum, however, the plaintiff submitted the deposition testimony of the superintendent, who testified that he is required to guarantee that the board's employees are familiar with the sexual harassment policy. This testimony creates an issue of fact as to whether the superintendent or the board has the mandatory duty to distribute, at the time of hire and on an annual basis, the sexual harassment policy to Eramo. This unresolved factual issue is material to the qualified immunity defense of the superintendent and the board, and therefore, summary judgment is inappropriate.

Based on the foregoing, this court need not consider whether the plaintiff's additional negligence allegations in count three constitute ministerial or discretionary conduct. "In Connecticut, there is no appellate authority as to whether a court can permit summary judgment against a party relative to individual allegations within a single count of a complaint. At the trial court level there is a split of authority on the issue. A review of the decisions finds that the majority of the cases do not allow a party to eliminate some, but not all, of the allegations of a single count through a motion for summary judgment ... [S]ome courts have found that the language of Practice Book § 17–51 authorizes the entry of summary judgment on part of a claim within a single count provided final judgment can be entered with respect to that part of the claim and it can be severed from the remainder of the claim ... Nonetheless, the majority rule ... is that Connecticut procedure does not allow entry of summary judgment on one part or allegation of a cause of action when the ruling will not dispose of an entire claim, and therefore, will not allow entry of judgment on that claim."[12] (Citation omitted; internal quotation marks omitted.) *Embry v. Hartford,* Superior Court, judicial district of Hartford, Docket No. CV 07 5014615 (October 18, 2011, Domnarksi, J.). Here, the court follows the majority rule. Thus, even assuming, *arguendo,* that the plaintiff's additional allegations are barred by the doctrine of governmental immunity, Connecticut procedure does not permit an entry of summary judgment against them.

II

*8 Next, the defendants argue that there is no basis upon which to impart a legal duty on the defendants, as the sexual assault of the plaintiff was not foreseeable. In opposition, the plaintiff argues that her sexual assault was "all too predictable based on information that had amassed on Eramo prior to it." According to the plaintiff, the defendants knew or should have known that Eramo was likely to misbehave off campus with a minor. Moreover, the plaintiff asserts that the defendants knew that the plaintiff was a specific target of Eramo's misconduct based on the nonfraternization complaint. As a result, the plaintiff argues that the defendants owed a duty to the plaintiff.

In order to prevail in a negligence action, "[a] plaintiff must [establish] all of the essential elements of the tort ... These elements are: duty; breach of that duty; causation; and actual injury." (Internal quotation marks omitted.) *Rawls v. Progressive Northern Ins. Co.,* 130 Conn.App. 502, 507, 23 A.3d 100, cert. granted in part on other grounds, 302 Conn. 935, 28 A.3d 990 (2011). "Issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner ... Summary judgment is particularly ill-adapted to negligence cases, where ... the ultimate issue in contention involves a mixed question of fact and law ..." (Citation omitted; internal quotation marks omitted.) *Busque v. Oakwood Farms Sports Center, Inc.,* 80 Conn.App. 603, 607, 836 A.2d 463 (2003), cert. denied, 267 Conn. 919, 841 A.2d 1190 (2004).

"The existence of a duty of care is a prerequisite to a finding of negligence ... The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand." (Internal quotation marks omitted.) *Leon v. DeJesus,* 123 Conn.App. 574, 576, 2 A.3d 956 (2010). "[U]nder some circumstances [however] the question involves elements of both fact and law." *LaFlamme v. Dallessio,* 261 Conn. 247, 251, 802 A.2d 63 (2002). While the question of whether a defendant owes a duty of care may be an appropriate matter for summary judgment; *Mozeleski v. Thomas,* 76 Conn.App. 287, 290, 818 A.2d 893, cert. denied, 264 Conn. 904, 823 A.2d 1221 (2003); it should not be rendered if the issue of duty involves elements of both fact and law. *Raboin v. North American Industries, Inc.,* 57 Conn.App. 535, 538, 749 A.2d 89, cert. denied, 254 Conn. 910, 759 A.2d 505 (2000); see also *Bemis v. Bemis,* Superior Court, judicial district of New London, Docket No. CV 07 5004728 (July 8, 2008, Martin, J.) ("the existence of the duty or its absence often hinges on what the facts are, and if in dispute, a summary judgment decision ought not rest on the unsettled foundation" [internal quotation marks omitted]).

In order to establish the existence of a legal duty, a plaintiff must satisfy both prongs of a two-part test. *Ryan Transportation, Inc. v. M & G Associates,* 266 Conn. 520, 528–29, 832 A.2d 1180 (2003). "Our Supreme Court has stated that the test for the existence of a legal duty entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." (Internal quotation marks omitted.) *Leon v. DeJesus, supra,* 123 Conn.App. at 576. "The first part of the test invokes the question of foreseeability, and the second part invokes the question of policy." (Internal quotation marks omitted.) *Neuhaus v. DeCholnoky,* 280 Conn. 190, 218, 905 A.2d 1135 (2006).

*9 "[O]ur threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant ... By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result? ... The idea of risk in this context necessarily involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may possibly follow ... Accordingly, the *fact finder* must consider whether the defendant knew, or should have known, that the situation at hand would obviously and naturally, even though not necessarily, expose [the plaintiff] to probable injury unless preventive measures were taken." (Citations omitted; emphasis added; internal quotation marks omitted.) *LePage v. Horne,* 262 Conn. 116, 124, 809 A.2d 505 (2002).

At the same time, "[a] simple conclusion that the harm to the plaintiff was foreseeable ... cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed ... A further inquiry must be made, for [our Supreme Court] recognize[s] that duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection ... The final step in the duty inquiry, then, is to make determination of the fundamental policy of the law, as to

whether the defendant's responsibility should extend to such results ." (Internal quotation marks omitted.) *Pelletier v. Sordoni/Skanska Construction Co.,* 286 Conn. 563, 594, 945 A.2d 388 (2008).

Viewing the evidence in a light most favorable to the plaintiff, the following undisputed facts are relevant for purposes of the present motion. Eramo was an English teacher at Staples between August 2001, and June 2003. The superintendent was hired in 1999. The principal was the deputy superintendent of all public schools in Westport from 1999 until the summer of 2002. Subsequently, the principal was hired as the acting principal at Staples for the 2002–2003 academic school year. In early 2003, the principal was hired as the permanent principal and remained at the position until October 2004. Prior to 2002, Rakovic was the principal at Staples (former principal).

The following evidence was also submitted. In November of 2001, Morgan, the administrator of pupil services, sent a memorandum to Eramo, stating that he failed to attend a mandatory staff development meeting. The memorandum indicates that it was sent to the former principal and Comm, the chairperson of the English department, and was also placed in Eramo's personal file. The memorandum states that Eramo displayed aggressive behavior toward Morgan after she inquired about his lack of attendance at the meeting. On the same day as the incident, Eramo sent an email to Morgan, apologizing for his "aggressive, rude and unacceptable" behavior.

***10** In May 2002, Eramo and Michelle Cota, a female reading teacher at Staples, engaged in an argument in front of students during school hours. At the time, Eramo and Cota were engaged in a personal relationship. Gerald Kuroghlian, a teacher at Staples, witnessed the argument. The pertinent deposition testimony of Kuroghlian is as follows:

> Q. I want to ask you, Dr. Kuroghlian, what was the first time that you remember having any kind of a meeting involving Mr. Eramo?
>
> A. Mr. Eramo was dating at the time an English reading teacher at [Staples] ... and they had a major argument in the halls of the school, which went beyond the bounds of ... decency in front of students ...
>
> Q. And do you recall what started the altercation?
>
> A. I was not on the initial phase. They apparently ... had a disagreement ... over ... a date that they had the night before. [Eramo] accused her of being an alcoholic ... [which] then it escalated ... with "You are not good at oral sex ... you're a limp rag in bed," and this is in front of an audience of well over a hundred kids ...

As a result of this argument, Eramo received a written warning from the former principal. The written warning was to be placed in Eramo's personal file.

In February 2003, a ninth grade female student accused Eramo of sexual harassment. In particular, the student accused Eramo of: pulling the female student's ponytail, winking at her during an exam, and bumping her shoulder with his elbow. While Eramo admitted to this behavior, Morgan did not find that his actions constituted sexual harassment. Morgan did find, however, that Eramo's behavior was inappropriate. Moreover, in February 2003, Morgan became aware of the word "child molester" that was written on a desk in Eramo's classroom. In the same month, Comm and the principal decided not to rehire Eramo for the following year because of his "inappropriate behavior with students." Eramo, however, was permitted to submit a letter of resignation, which was effective at the completion of the school year, June 2003.

In the spring semester of 2003, Eramo was teaching several English classes and a contemporary world drama class. The plaintiff was a student in one of Eramo's English classes and often visited his office during and after school hours. Eramo met with the plaintiff more than any other student during his employment as a teacher at Staples. In May of 2003, members of the English department began discussing rumors that female students visited Eramo's home in Milford, Connecticut. According to Kuroghlian's deposition testimony, "there was a specific incident in which the kids said that two ... girls had spent the night at [Eramo's] home, and that's when it completely went wild, because I don't think the girls denied it ... [B]y ... the second or third week of May, names were being named." On June 17, 2003, Eramo met with the principal and Kuroghlian, and admitted that he had two female students stay overnight at his residence in late May 2003.[13] Consequently, the principal immediately terminated Eramo's employment at Staples.

***11** Finally, evidence was submitted that before his employment was terminated, Eramo invited the plaintiff to New York

City to attend a jazz club during Memorial Day weekend of 2003. During the trip, Eramo and the plaintiff drank alcohol. After leaving the jazz club, the plaintiff fell asleep in Eramo's car and woke up in his apartment in Milford. At the apartment, Eramo engaged in sexual intercourse with the plaintiff.

A

As a threshold issue, in their reply memorandum, the defendants address the public policy prong of the legal duty test. Specifically, the defendants assert that any special relationship between the defendants and the plaintiff has been recognized to exist only during school hours. Therefore, the defendants argue that no special duty of care was owed, as the plaintiff was allegedly sexually assaulted on a weekend at Eramo's personal residence.[14]

The defendants focus their analysis on the foreseeability prong of the legal duty test, and raise the public policy issue for the first time in their reply memorandum. "[I]t is a well established principle that arguments cannot be raised for the first time in a reply brief." (Internal quotation marks omitted.) *Wilton Meadows Ltd. Partnership v. Coratolo,* 299 Conn. 819, 824 n. 3, 14 A .3d 982 (2011). While this rule is typically applied by our appellate courts, trial courts have applied this rule in recent Superior Court decisions. See *Plank v. Wolf's Den Cooperative Playground Assn., Inc.,* Superior Court, judicial district of Middlesex, Docket No. CV 07 5003207 (July 27, 2009, Jones, J.); *Maryland Casualty Co. v. DNR Painting Co.,* Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket No. CV 07 4012459 (February 17, 2009, Pavia, J.); *Rivers v. Institute of Police Technology & Management,* Superior Court, judicial district of New Haven, Docket No. CV 06 4004190 (September 3, 2008, Zoarski, J.). As a result, the issue of whether any special relationship extends to the plaintiff, who was allegedly sexually assaulted at Eramo's personal residence and not during school hours, is not properly before the court.

B

As to the foreseeability prong of the legal duty test, the question of a legal duty in the present case is riddled with issues of fact that preclude the rendering of summary judgment in favor of the principal. Specifically, a jury should decide whether, in view of the vulnerability of the plaintiff as a minor, Eramo's reputation among students, and his aggressive and inappropriate behavior toward females and female students, an ordinary person would foresee that the harm of the general nature suffered by the plaintiff would result from the principal's failure to investigate the nonfraternization complaint.[15] Accordingly, summary judgment is inappropriate, as the question of whether the principal owed the plaintiff a duty involves issues that are to be resolved by the trier of fact.

The next question is whether the superintendent and the board owed a duty of care under the circumstances of the present case. Here, the sexual harassment policy was required to be distributed to Eramo on an annual basis. The defendants, however, did not submit evidence demonstrating when the annual distribution of the sexual harassment policy would occur, nor was any such evidence submitted by the plaintiff. Thus, an issue of fact remains as to whether the superintendent and the board, at the time of the required annual distribution, knew or should have known that characteristics of Eramo would lead an ordinary person to anticipate that the general nature of the harm suffered by the plaintiff was likely to result. As a result, the superintendent and the board fail to satisfy their burden of demonstrating an absence of a genuine issue of material fact and consequently, they are not entitled to summary judgment.

***12** Notwithstanding the above, the crux of the defendants' argument is that it is not reasonably foreseeable that the plaintiff would be sexually assaulted by a teacher on a weekend at his personal residence. The nonfraternization policy, however, contemplates the possibility of a teacher and a student engaging in a sexually motivated personal relationship outside of school hours by prohibiting "a personal relationship on *or off campus* that is sexually motivated or nuanced ..." (Emphasis added.) Moreover, according to Kuroghlian's deposition testimony, in May 2003, rumors were circulating that female students stayed overnight at Eramo's home. Therefore, issues of fact exist as to whether an ordinary person, knowing what the defendants knew *or should have known,* would reasonably foresee that harm of the same general nature, as that which was suffered by the plaintiff, would occur on private property and not during school hours.

III

The defendants argue that their alleged negligent conduct was not the proximate cause of the plaintiff's injuries. In Connecticut, "issues of proximate cause may be determined by way of summary judgment only in rare circumstances. [T]he question of proximate causation generally belongs to the trier of fact because causation is essentially a factual issue ... It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Internal quotation marks omitted.) *Kumah v. Brown,* 130 Conn.App. 343, 349, 23 A.3d 758 (2011).

Our Appellate Court has set forth the standard for the causation element of a negligence claim. "[A] plaintiff must establish that the defendant's conduct legally caused the injuries ... The first component of legal cause is causation in fact. Causation in fact is the purest legal application of ... legal cause. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct ... The second component of legal cause is proximate cause ... [T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries ... Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendant's conduct] ... The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection ... This causal connection must be based upon more than conjecture and surmise." (Internal quotation marks omitted.) *Twin Oaks Condominium Assn., Inc. v. Jones,* 132 Conn.App. 8, 13–14, 30 A.3d 7 (2011); see also *Doe v. Manheimer,* 212 Conn. 748, 758, 563 A.2d 699 (1989) (a substantial factor is defined as "one which must have continued down to the moment of the damage or, at least, down to the setting in motion of the final active injurious force which immediately produced or preceded the damage" [internal quotation marks omitted], rev'd in part on other grounds, 234 Conn. 597, 662 A.2d 753 (1995).

***13** While the superceding cause doctrine is abolished in most Connecticut civil cases; *Barry v. Quality Steel Products, Inc.,* 263 Conn. 424, 440, 820 A.2d 258 (2003); the doctrine is applicable in matters involving unforeseeable intentional torts and criminal acts. *Sullivan v. Metro–North Commuter Railroad Co.,* 292 Conn. 150, 165, 971 A.2d 676 (2009); *Barry v. Quality Steel Products, Inc., supra,* at 439 n. 16. Specifically, "a negligent defendant, whose conduct creates or increases the risk of a particular harm and is a substantial factor in causing that harm, is not relieved from liability by the intervention of another person, except where the harm is intentionally caused by the third person *and* is not within the scope of the risk created by the defendant's conduct ... Therefore, the liability of the defendants depends on the foreseeability of the plaintiff's attack as well as the extent to which the defendants' alleged negligence was a substantial factor in causing the plaintiff's injuries." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Monk v. Temple George Associates, LLC,* 273 Conn. 108, 124–25, 869 A.2d 179 (2005), citing 2 Restatement (Second), Torts § 442B (1965); see also *Alexander v. Vernon,* 101 Conn.App. 477, 484, 923 A.2d 748 (2007) ("[i]n negligence cases ... in which a tortfeasor's conduct is not the direct cause of the harm, the question of legal causation is practically indistinguishable from an analysis of the extent of the tortfeasor's duty to the [victim]" [internal quotation marks omitted]).

In the present case, the defendants' proximate causation argument is directed only against the plaintiff's negligent retention, training and supervision allegations. The defendants' argument is devoid of any reference to the nonfraternization policy or the sexual harassment policy. "It is not the province of this court to formulate arguments for the parties ... [This court has] stated that [it is] not required to review issues that have been improperly presented to this court through an inadequate brief." (Citation omitted; internal quotation marks omitted.) *Santacapita v. Board of Education,* Superior Court, judicial district of Fairfield, Docket No. CV 09 4028116 (August 9, 2011, Bellis, J.). As a result, the defendants fail to meet their burden of establishing an absence of an issue of material fact that the plaintiff's alleged sexual assault was not a foreseeable risk created by the defendants' alleged negligence.

Viewing the evidence in a light most favorable to the plaintiff, the evidence submitted sets forth sufficient facts demonstrating that there is room for a reasonable disagreement that the alleged sexual abuse, sexual exploitation and sexual assault were a foreseeable risk created by the defendants' negligent conduct. Accordingly, the issue of proximate causation is a question to be determined by the trier as a matter of fact.

Based on the above, the board is not entitled to summary judgment as to the plaintiff's vicarious liability claim under § 52–557n based on the alleged negligence of the principal and the superintendent.

Count Four

I

***14** The defendants move for summary judgment against count four on the same grounds as against count three.[16] The defendants further assert that the plaintiff fails to rely upon a statute abrogating the board's immunity and the board is not liable for the intentional torts and criminal acts of Eramo. The plaintiff does not address these issues in her memorandum in opposition to the defendants' motion for summary judgment.

The court first turns to the issue of whether count four fails to allege a statute abrogating the board's immunity. In Connecticut, "a municipality is immune from liability for negligence unless the legislature has enacted a statute abrogating that immunity." (Internal quotation marks omitted.) *Caruso v. Milford,* 75 Conn .App. 95, 99, 815 A.2d 167, cert. denied, 263 Conn. 907, 819 A.2d 838 (2003), citing *Williams v. New Haven,* 243 Conn. 763, 766–67, 707 A.2d 1251 (1998). "[A]lthough a plaintiff should plead a statute [pursuant to Practice Book § 10–3(a)] in a complaint that abrogates governmental immunity, failing to do so will not necessarily bar recovery as long as the defendants are sufficiently apprised of the applicable statute during the course of the proceedings.]"[17] (Citation omitted; internal quotation marks omitted.) *Grady v. Somers,* 294 Conn. 324, 329 n. 6, 984 A.2d 684 (2009); see also *Krill v. Derby,* Superior Court, judicial district of Ansonia–Milford at Derby, Docket No. CV 08 5005376 (February 17, 2010, Bellis, J.) (same).

In count four, the plaintiff in the present case does not rely on or cite to any statute as a means of abrogating the board's immunity from vicarious liability. Nevertheless, the plaintiff cites § 52–557n in count three in support of her statutory vicarious liability claim against the board. Therefore, the defendants are sufficiently apprised of the applicable statute in count four. As a result, the defendants' argument fails.[18]

Next, the board argues that it is not liable for the intentional torts and criminal acts of Eramo. Section 52–557n(a)(2) provides in relevant part: "[A] political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct ..." "Section 52–557n exempts municipalities from liability for the acts of its employees that 'constitute criminal conduct.' There is no requirement that the employee be charged or convicted of a crime before a municipality is exempt from liability." *Romano v. Derby,* 42 Conn.App. 624, 630, 681 A.2d 387 (1996); see also *Avoletta v. Torrington,* 133 Conn.App. 215, 224, 34 A.3d 445 (2012) ("a municipality cannot be held liable for the intentional torts of its employees"); see also *O'Connor v. Board of Education, supra,* 90 Conn.App. at 65 ("there is no distinction between 'intentional' and 'wilful' conduct").

***15** In count four, the plaintiff alleges, *inter alia,* that the plaintiff was a minor and that "Eramo sexually abused, sexually assaulted and sexually exploited the plaintiff." The plaintiff does not allege specifically explicitly that Eramo acted intentionally or wilfully. Based on these allegations, however, the acts alleged by the plaintiff constitute criminal conduct. See General Statutes § 53a–71 ("[a] person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and ... the actor is a school employee and such other person is a student enrolled in a school in which the actor works"). Accordingly, § 52–557n shields the board from liability insofar as it applies to Eramo's criminal conduct.

Nonetheless, the court, as previously indicated, is of the opinion that it cannot properly grant summary judgment against some, but not all the allegations of a single count. See *Embry v. Hartford, supra,* Superior Court, Docket No. CV 07 5014615 ("the majority rule ... is that Connecticut procedure does not allow entry of summary judgment on one part or allegation of a cause of action when the ruling will not dispose of an entire claim, and therefore, will not allow entry of judgment on that claim"). In addition to the allegations based on Eramo's conduct, the plaintiff alleges in count four that the board is

vicariously liable for the negligence of the principal and the superintendent. As a result, the board is not entitled to summary judgment, as this court cannot properly enter summary judgment as to part of a cause of action.

Count Five

I

Lastly, the defendants argue that § 10–235 does not provide a direct cause of action against the board, and that, therefore, the court should grant summary judgment as to count five. The plaintiff counters that a direct cause of action exists against the board, as the principal and superintendent are named in the amended complaint.

Pursuant to § 10–235, "[our] legislature intended to make indemnification available to a board of education employee for losses sustained from claims or suits for damages ..." *King v.. Board of Education,* 195 Conn. 90, 97, 486 A.2d 1111 (1985). Specifically, § 10–235 provides in relevant part: "Each board of education shall protect and save harmless ... any teacher or other employee thereof ... from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to ... any person ... which acts are not wanton, reckless or malicious, provided such teacher ... or employee, at the time of the acts resulting in such injury ... was acting in the discharge of his or her duties or within the scope of employment ..."

Our appellate courts have not addressed the question of whether § 10–235 creates a direct cause of action against a board of education. In *Logan v. New Haven,* 49 Conn.Sup. 261, 873 A.2d 275 [38 Conn. L. Rptr. 700] (2005), a well reasoned Superior Court decision, the trial court, Blue, J., discussed whether § 10–235 provides a direct cause of action against a board of education. In particular, the court stated: "There is nothing in the statute which does, or imports to, impose on [a] board of education direct liability to [a] plaintiff, whether under the theory of respondeat superior, abolition of defense of governmental immunity, or otherwise. On the contrary, the statute provides, where applicable, that [the individual defendant] be protected and saved harmless from loss or expense consequent upon certain enumerated types of civil misconduct on his part. The plaintiff's rights of action are unaffected by the enactment of the statute. And unless, and until, [the individual defendant] has sustained a loss, [the individual defendant's] right of action under the statute against the board of education does not arise. The statute clearly provides for indemnification from loss, not indemnification from liability." (Internal quotation marks omitted.) *Id.,* at 263–64. As a result, the court held that § 10–235 provides indemnification, not liability, and therefore, the statute does not provide for a direct cause of action against a board of education. *Id.;* see also *Hetrick v. West Hartford,* Superior Court, judicial district of Hartford, Docket No. CV 03 0823772 (June 28, 2006, Scholl, J.) ("[section 10–235] gives no right to a direct action against the board, it is simply an indemnity statute and if the legislature wanted to provide for a direct action under its auspices it could have easily so indicated" [internal quotation marks omitted]).

***16** In addition to *Logan,* the majority of recent Superior Court decisions have held that § 10–235 does not create a direct cause of action against a board of education. *Rodriguez v. Anker,* Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket No. CV 07 6000465 (January 12, 2009, Downey, J.); *Bacote v. New Haven,* Superior Court, judicial district of New Haven, Docket No. CV 06 5005855 (November 7, 2008, Robinson, J.); *Fotheringham v.. East Haven,* Superior Court, judicial district of New Haven, Docket No. CV 06 5007577 (February 1, 2008, Cosgrove, J.); *Devonish v. Bloomfield,* Superior Court, judicial district of Hartford, Docket No. CV 03 0825932 (May 9, 2007, Wiese, J.); *Barnum v. Milford,* Superior Court, judicial district of Ansonia–Milford at Derby, Docket No. CV 05 5000225 (October 29, 2007, Esposito, J.); *Logan v. Adams,* Superior Court, judicial district of New Haven, Docket No. CV 03 0477815 (August 24, 2005, Devlin, J.); *Saez v. Suarez,* Superior Court, judicial district of New Haven, Docket No. CV 00 0443901 (July 15, 2005, Corradino, J.); *Ferrigno v. Leblang,* Superior Court, judicial district of New Haven, Docket No. CV 04 55031 (June 28, 2004, Arnold, J.) But see *Ritter v. Westport,* Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket No. CV00 0178892 (June 12, 2003, Lewis, J.); *DeLeon v. Hartford Board of Education,* Superior Court, judicial district of Hartford, Docket No. CV 96 0566449 (April 15, 1997, Wagner, J.) (19 Conn. L. Rptr. 345, 346–47); *Nowinski v. Greenwich,* Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket No. 111420 (March 16, 1994, Lewis, J.).

In the present case, the court follows the majority approach and holds that § 10–235 does not create a direct cause of action against the board. Accordingly, the board is entitled to summary judgment as to count five.

For the foregoing reasons, the defendants' motion for summary judgment is denied as to counts three and four, and granted as to count five.

All Citations

Not Reported in A.3d, 2012 WL 1004308

Footnotes

1 On August 1, 2008, the court granted permission to the plaintiff to use the "Jane Doe" pseudonym.

2 Eramo is not a moving party for purposes of the present motion for summary judgment. Therefore, "the defendants" shall refer only to the board, the superintendent and the principal.

3 On October 27, 2011, the plaintiff filed a request for leave to amend her sixth amended complaint and subsequently filed her seventh amended complaint. The parties agreed at oral argument that the court should treat the seventh amended complaint as the operative complaint for purposes of the present motion.

4 Section 52–557n provides in relevant part: "[A] political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties ... (2) ... [A] political subdivision of the state shall not be liable for damages to person or property caused by ... (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

5 The nonfraternization policy provides in relevant part: "Complaints ... should be reported to the [p]rincipal; who will investigate to determine whether a violation has occurred." For purposes of this memorandum, this provision will be referred to as the "nonfraternization provision."

6 The sexual harassment policy provides in relevant part: "A copy of this policy will be distributed to all current employees and to all new employees at the time of hire. It will also be distributed annually to all employees and students." For purposes of this memorandum, this provision will be referred to as the "sexual harassment provision."

7 In count three, the plaintiff further alleges the following claims against the defendants: (1) Negligent retention; (2) negligent supervision; (3) negligent hiring; (4) negligent training; (5) premises liability; (6) negligence per se; (7) violations of school bylaws and other school policies; and (8) violations of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. Moreover, all of the plaintiff's allegations are combined and each allegation is set forth against the board, the principal and the superintendent, individually, and against the board pursuant to a vicarious liability theory under § 52–557n.

8 Section 10–235 provides in relevant part: "Each board of education shall protect and save harmless ... any teacher or other employee thereof ... from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to or death of any person ... which acts are not wanton, reckless or malicious, provided such teacher ... or employee, at the time of the acts resulting in such injury ... was acting in the discharge of his or her duties or within the scope of employment ..."

9 Insomuch as the court is not relying on the two exhibits objected to by the defendants, it is unnecessary for the court to rule on the defendants' motion to strike.

10 Neither party in the present case objects to the authenticity of any of the exhibits and therefore, the court, in its discretion, may consider the documents.

11 The facts surrounding the nonfraternization complaint are in dispute. Specifically, the plaintiff submits the deposition testimony of the plaintiff's mother, who testifies to the following facts. In April 2003, the plaintiff's mother observed several emails on the family computer sent to the plaintiff from Eramo. In particular, "[t]he nature of [an] email was over complimentary, there was ... *an invitation to go to dinner,* there was talk about how beautiful she was, how talented she was, it was completely inappropriate."

(Emphasis added.) The plaintiff's mother subsequently called and complained to the principal about the email, and the principal responded that Eramo "was on his radar." In his deposition, however, the principal denies that the plaintiff's mother complained to the principal about the email. Nonetheless, this issue of fact is not material for purposes of determining whether the alleged conduct is ministerial or discretionary. See *Mulligan v. Rioux,* 229 Conn. 716, 736, 643 A.2d 1226 (1994) ("[a]lthough the ultimate determination of whether qualified immunity applies is ordinarily a question of law for the court, when ... there are unresolved factual issues *material* to the applicability of the defense ... resolution of those factual issues is properly left to the jury" [emphasis in original]). Instead, the issue is material as to whether the principal breached his ministerial duty to investigate the nonfraternization complaint.

12 Section 17–51 provides: "If it appears that the defense applies to only part of the claim, or that any part is admitted, the moving party may have final judgment forthwith for so much of the claim as the defense does not apply to, or as is admitted, on such terms as may be just; and the action may be severed and proceeded with as respects the remainder of the claim."

13 In footnote two of their motion, the defendants argue that "it is undisputed that [the sleep over] incident postdated the alleged sexual assault of the plaintiff on Memorial Day weekend of 2003." The defendants, however, fail to support their assertion with any evidence. See *Billboards Divinity, LLC v. Commissioner of Transportation, supra,* 133 Conn.App. at 413 ("[m]ere assertions of fact ... are insufficient to establish the existence of a material fact" [internal quotation marks omitted]).

14 "With respect to the second inquiry [of the legal duty test], namely, the policy analysis, there generally is no duty that obligates one party to aid or to protect another party ... One exception to this general rule arises when a definite relationship between the parties is of such a character that public policy justifies the imposition of a duty to aid or to protect another ... In delineating more precisely the parameters of this limited exception to the general rule, this court has concluded that, [in the absence of] a *special relationship of custody or control,* there is no duty to protect a third person from the conduct of another." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Murdock v. Croughwell,* 268 Conn. 559, 566, 848 A.2d 363 (2004).

15 While it is undisputed that the principal was not the acting principal of Staples before June 2002, an issue of fact exists as to whether the principal should have known about the incidents that occurred in 2001, as they were documented and placed in Eramo's personal file.

16 For the reasons set forth in the court's analysis as to count three, the board is not entitled to summary judgment as to count four on the grounds that the defendants are afforded governmental immunity, the defendants owed no duty of care to the plaintiff, or that the defendants' alleged conduct was not the proximate cause of the plaintiff's injuries.

17 Section 10–3(a) provides in relevant part: "When any claim made in a complaint ... is grounded on a statute, the statute shall be specifically identified by its number."

18 In essence, counts three and four are duplicative of each other, as to the board's liability for the negligence of the principal and the superintendent. This court has held, however, that "duplicative allegations should be addressed in a request to revise ..." *DeGregorio v. Glenrock Condominium Assn., Inc.,* Superior Court, judicial district of Ansonia–Milford at Derby, Docket No. CV 07 5002796 (October 13, 2009, Bellis, J.).

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

Alisha MAHON
v.
CITY OF HARTFORD et al.

No. HHDCV136042701S.
|
Feb. 1, 2016.

Synopsis
Background: Student brought action against city and city board of education, alleging she sustained an injury to her eye when she was struck in the face with a thrown bottle while walking down school hallway at time when lights had been turned off by another student, causing her to become blind in affected eye.

Holdings: The Superior Court, Judicial District of Hartford, Peck, J., held that:

[1] duty of city and city board of education to supervise students in school hallways was discretionary and, thus, governmental immunity applied to such duty, and

[2] identifiable person-imminent harm exception to discretionary act immunity applied to student's negligence claim; and

[3] one million dollars was appropriate non-economic damages award.

Judgment in favor of plaintiff.

West Headnotes (4)

[1] **Education**⇐Injuries by Other Students

Duty of city and city board of education to supervise students in school hallways was discretionary and, thus, governmental immunity applied to such duty, with respect to negligence claim brought by student, who alleged she sustained an injury to her eye when she was struck in the face with a thrown bottle while walking down school hallway at time when lights had been turned off by another student. C.G.S.A. § 52–557n(a)(2)(B).

Cases that cite this headnote

[2] **Education**⇐Injuries by Other Students

Identifiable person-imminent harm exception to discretionary act immunity applied to student's negligence claim against city and city board of education for failure to monitor school hallways, which caused student to sustain eye injury when she was struck in the face with a thrown bottle while walking down school hallway at time when lights had been turned off by another student; school's principal indicated it was apparent to him that dangerous condition was created when hallway lights were turned off, given likelihood that mischief or mayhem would ensue, defendants were aware that students had manipulated lights in past without need of a key, yet took no precautions, and lack of light provided cloak of anonymity to embolden another student to thoughtlessly project full bottle of water with enough force to blind student. C.G.S.A. § 52–557n(a)(2)(B).

Cases that cite this headnote

[3] **Education**⇐Injuries by Other Students

Assertions by city and city board of education that high school student failed to be watchful of others at time of subject incident, failed to use her senses and faculties to avoid accident, and failed to inform school employees before incident took place did not establish that student was contributorily negligent as to eye injury she sustained when she was struck in the face with a thrown water bottle while walking down school hallway between classes at time when lights had been turned off by another student.

Cases that cite this headnote

[4] **Damages**⇐Eye Injuries and Loss of Vision
Damages⇐Particular Cases

One million dollars was appropriate non-economic damages award against city and city board of education for 21-year-old high school student's physical pain and suffering, mental suffering, loss of enjoyment of life's usual activities and permanency arising from eye injury she sustained when struck in the face with a thrown bottle while walking down school hallway at time when lights had been turned off by another student, all of which led to her becoming legally blind in affected eye and developing lazy eyelid; student was at risk for further complications that could require injections on monthly or bi-monthly basis, student had life expectancy of 60 years, and student had difficulty with everyday tasks, having lost peripheral vision and having trouble with depth perception.

Cases that cite this headnote

Attorneys and Law Firms

Hersh & Crockett, Hartford, for Alisha Mahon.

Corporation Counsel Hartford, Hartford, for City of Hartford.

Opinion

*1 PECK, J.

On June 17, 2013, the plaintiff, Alisha Mahon, filed a two-count complaint alleging negligence against the defendants, the City of Hartford and the City of Hartford Board of Education (Board). The plaintiff alleged that on May 25, 2012, as a student of Hartford High School, she sustained an injury to her eye when she was struck in the face with a thrown bottle while walking down the north hallway of the second floor. At the time the plaintiff was struck, the hallway lights had been turned off. The plaintiff alleged that her injuries were the result of the defendants' negligence through their agents, servants, and/employees' failure to supervise the premises. On September 5, 2013, the defendants filed an answer and special defenses that denied the plaintiff's allegations and asserted the special defenses of contributory negligence and governmental immunity, pursuant to General Statutes § 52–557n. On September 18, 2013, and December 9, 2014, the plaintiff filed a reply and an amendment to the reply that denied the special defenses.

A court trial was held over the course of three days, December 9, 2014, April 13, 2014, and June 13, 2015. Witnesses included the plaintiff; Gwen Carter, the plaintiff's mother; and David Chambers, former principal of the Nursing Academy of Hartford Public High School. The defendants and the plaintiff filed post-trial briefs on June 15, 2015, and June 26, 2015, respectively. The defendants filed a reply on July 2, 2015.

I

FINDINGS OF FACT

Based upon the testimony of the witnesses and the full exhibits, the court finds the following facts. On May 25, 2012, a few weeks before graduation, after lunch time in the Nursing Academy of Hartford Public High School, at approximately 12:42 p.m., the plaintiff suffered a serious eye injury as she exited the computer room, in the north hallway of the second floor, on her way to a science class around the corner. The lights were out in the hallways at the time. It was dark but there was some ambient light. As she turned the corner, she was struck in the right eye by a full plastic bottle of water, which had been propelled through the air by a black male student wearing nurse's scrubs. Because the lights were out, she did not see the water bottle coming. She was not involved in any dispute with the student believed to have thrown the bottle or any other student at Hartford High School as of the date of the incident. There is no indication that the student in question was targeting her. There is no evidence that the person who shut off the lights was the same person who threw the water bottle. There are video cameras in the hallways recording what takes place but they are not monitored in real time. The lights in the hallway were turned off just prior to the time the plaintiff exited the computer room. Although the plaintiff did not see any teachers or other staff in the hallway prior to getting hit with the bottle, it only took a minute or two for a teacher to come to her aid. The police were called to the scene. The plaintiff was bleeding from her right eye. When it was observed that the plaintiff's right eye was swollen shut, an ambulance was called and the plaintiff was transported to Saint Francis Hospital.

*2 At the time of the incident, David Chambers was the principal of the Nursing Academy. He served in that position from 2007 until June 2014, when he became principal of New Britain High School. He was present at Hartford High School at the time of the incident. The hallway light switches are meant to be operated with a key that has two prongs designed to fit into the socket that works as a switch. Chambers testified that in his "twenty some years of experience" all the schools are operated with a "little forked key" to prevent kids from turning off the lights. However, students were apparently able to manipulate the on/off switch with either a paperclip or other similar apparatus that could be inserted into the socket. Chambers stated: "It takes a prong key to go into the socket and then to move it up or down, but we do believe that a student was able to do that with some other apparatus." The light switches are not covered or protected from access in any way. Although Chambers could not specify a number of times, on occasions prior to May 25, 2012, rows of hallway lights had been turned off by students. However, in their answers to the plaintiff's request for admissions, the defendants admitted that "[o]n many occasions prior to May 25, 2012 the hallway lights at Hartford High School had been turned off by students."[1] The defendants also admitted in their answers that the light switches were not secured from access by students.[2]

On May 25, 2012, right at lunch time one row of hallway lights was turned off. When that row was turned back on, a second row of hallway lights was turned off and on; and finally, the row of lights in the hallway where the plaintiff was injured was turned off. This occurred in a sequence. Ultimately, the Hartford Police were able to identify the culprit as Yumac Santiago, who informed the investigating officer that "he shut off the lights near the auditorium with the finger nail of his left pinky finger." He did not think he shut off the lights in the hallway where the plaintiff was injured.[3] The police were not able to identify the student who threw the bottle.

There was a Hartford police officer assigned to the neighborhood who was stationed at an office in the school. For the most part the officer stayed in his office area unless he was out on a call in the neighborhood. Each of the three academies at the school had its own security guard and a separate lunch period. There was also another security guard stationed at the front door and an additional security guard shared by all three academies. At the time of the incident, the Nursing Academy security guard was probably following or leading the group of students coming up from the cafeteria. As students change classes, teachers are expected to be in the hallway but they are not mandated to do so. Typically, they straddle the doorway so they can monitor inside and outside the classroom. There are classrooms along the hallway where the plaintiff was injured. Students were coming up from lunch at the time of the incident. Teachers were expected to have a presence in the hallways. Teachers have lunch at the same time as students so after lunch everyone is moving to their locations or positions. There were two or three teachers in the hallways at or near where the plaintiff was injured.

*3 There were no teachers or school officials posted near the light switches to prevent students from shutting off the lights. Chambers testified that there was "a kind of hallway disturbance. The lights were turned out. At one point ... Alisha was hit by a water bottle ..." Start to finish, the time frame when the first hallway lights were shut off until all the hallway lights were back on was five to seven minutes. Chambers further testified that a key is required to turn the lights on and off so students are not turning off the lights and that when the lights go off and kids are in the hallway he would be concerned about "mayhem ... [s]omething happening, who knows ... something dangerous could happen ... In this case something did happen."

There is no policy in place of what staff or teachers should do if the lights are turned off. There are light switches at either end of each hallway. A radio call was made from the security guard that lights had been turned off in a particular hallway. Teachers would not have known of this unless they were in the hallway or at or near the security guard who made the radio call. The lights were out in the corridor where the plaintiff was injured for three or four minutes. In its answers to the request for admissions, the Board admits that it has a duty to keep the students at Hartford High School reasonably safe and also that it has a duty of reasonable supervision of the students at Hartford High School.[4]

The plaintiff is 21 years old. She is a beautiful young woman whose life plan has been dramatically altered by the injury she suffered on May 25, 2012. She had 20/20 vision in both eyes prior to the incident and is now legally blind in her right eye with vision in the 20/400 range. According to the retina specialist with whom she treated, the plaintiff's injury is permanent and irreversible. She is now required to wear glasses to protect her good eye. Because of the extensive damage to the retina and pigment underneath, surgery is not recommended. The injury caused her to miss the remainder of her senior year. She is 6′ 1″ tall, was planning a career as a model and began developing a portfolio including participation in fashion shows in furtherance of her goal. When she turned age eighteen, she had hoped to try out for the reality television program, America's Next Top Model.

The plaintiff claims economic damages in the total amount of $14,226.12, consisting of her ambulance, hospital and other medical bills for medical treatment. Because she is at risk for further complications, she may require anti-VEGF injections on a monthly or bi-monthly basis. The injections currently cost $1,700 per injection. She is 21 years old and has a life expectancy of 60 years, to age 81. She currently works at a retail store. She is very sensitive to light and has developed a lazy eyelid. She has difficulty with everyday tasks such as putting on makeup, grooming, night driving and is bothered by bright light. She has trouble with depth perception and has lost her peripheral vision. These injuries and disabilities are permanent in nature.

II

GOVERNMENTAL IMMUNITY

***4** The defendants argue that they are entitled to governmental immunity for their discretionary acts. Specifically, the defendants argue that their duties to supervise the premises was discretionary and not ministerial in nature. Additionally, there were no rules or policies for the supervision of the school hallways, and the determination of adequate supervision is discretionary. The plaintiff counters that the responsibility to supervise students in the hallways was ministerial because teachers were expected to monitor students as they moved between classes.

General Statutes § 52–557n codifies the circumstances under which a municipality may be held liable for negligence, but also provides municipal immunity from liability where "damages to person or property [are] caused by ... negligent acts or omissions [of its agents or employees] which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." General Statutes § 52–557n(a)(2)(B). "[Section] 52–557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages ... One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties ... [Section] 52–557n(a)(2)(B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions [of municipal officers] which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Edgerton v. Clinton,* 311 Conn. 217, 229, 86 A.3d 437 (2014).

Section 52–557n may provide immunity for the negligence of municipal agents in the performance of governmental acts requiring the use of independent judgment and discretion, but not for those acts which are purely ministerial in nature. "Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental [discretionary] acts." (Internal quotation marks omitted.) *Martel v. Metropolitan District Commission,* 275 Conn. 38, 48, 881 A.2d 194 (2005). Discretionary acts always involve "the exercise of judgment." (Internal quotation marks omitted.) *Id.,* at 49, 881 A.2d 194. "In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Spears v. Garcia,* 263 Conn. 22, 36, 818 A.2d 37 (2003). Generally, a duty is ministerial if it is "required by any ... charter provision, ordinance, regulation, rule, policy, or any other directive ... [and the manner of performance is] prescribed ..." *Violano v. Fernandez,* 280 Conn. 310, 323, 907 A.2d 1188 (2006). Supervision of school children is generally considered a discretionary duty. See *Heigl v. Board of Education,* 218 Conn. 1, 8, 587 A.2d 423 (1991); *Doe v. Board of Education,* 76 Conn.App. 296, 300, 819 A.2d 289 (2003).

***5** [1] In the present case, the defendants' duty to supervise the premises, specifically the hallways, was discretionary. Although "the scope of the duty of supervision is inherently a discretionary matter ... if a policy exists that mandates that a school official take a certain action which he or she then fails to do, a court may conclude that a ministerial duty exists as a matter of law ." (Citation omitted.) *Podgorski v. Pizzoferrato,* Superior Court, judicial district of Hartford, Docket No. CV–07–50102885 (October 7, 2009, Peck, J.) (48 Conn. L. Rptr. 613, 615); see *Kolaniak v. Board of Education,* 28 Conn.App. 277, 279–82, 610 A.2d 193 (1992) (finding ministerial duty to clear sidewalk of ice and snow where board of education had issued a bulletin to all custodians and maintenance personnel indicating walkways were to be inspected and kept clean on daily basis). Chambers' testimony that teachers were expected to supervise the hallways is not evidence that a policy or directive requiring specific action from the teachers in a prescribed manner had been instituted. Therefore, the defendants are entitled to governmental immunity for the discretionary duty of supervising the hallways. Because the court concludes that the defendants' alleged negligence implicates only their discretionary duties, the plaintiff may overcome governmental immunity only if her claim falls within the delineated exception to discretionary act immunity articulated by our Supreme Court. See *Williams v. Housing Authority,* 159 Conn.App. 679, 701, 124 A.3d 537, cert. granted on other grounds, 319 Conn. 947, 125 A.3d 528 (2015).

A

Exceptions to Discretionary Act Immunity

The plaintiff argues that the factual circumstances of this case provide for an exception to discretionary act immunity. Specifically, the plaintiff contends that it was apparent to the defendants that failure to prevent the hallway lights from being turned off would expose students to danger. The defendants counter that the darkened hallways alone were not dangerous and it was not apparent that failure to keep the lights on would lead to injury.

There are three exceptions that may abrogate municipal immunity for negligence arising out of discretionary acts. Each exception "represents a situation in which the public official's duty to act is [so] clear and unequivocal that the policy rationale underlying discretionary act immunity to encourage municipal officers to exercise judgment-has no force." (Internal quotation marks omitted.) *Violano v. Fernandez, supra,* 280 Conn. at 319, 907 A.2d 1188. The exception relating to the present case is the identifiable person-imminent harm exception under which "liability may be imposed when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm ..." (Internal quotation marks omitted.) *Id.,* at 320, 907 A.2d 1188. The exception has three elements: "(1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm ... All three must be proven in order for the exception to apply." (Citations omitted; internal quotation marks omitted.) *Edgerton v. Clinton, supra,* 311 Conn. at 230–31, 86 A.3d 437. There is no dispute between the parties that the plaintiff was an identifiable person.[5]

***6** "[T]he proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." *Haynes v. Middletown,* 314 Conn. 303, 322–23, 101 A.3d 249 (2014). The Appellate Court, in view of our Supreme Court's decision in *Haynes,* has stated that a plaintiff must satisfy a four-pronged test to qualify under the imminent harm exception: "First, the dangerous condition alleged by the plaintiff must be apparent to the municipal defendant ... [T]he dangerous condition must not be latent or otherwise undiscoverable by a reasonably objective person in the position and with the knowledge of the defendant. Second, the alleged dangerous condition must be likely to have caused the harm suffered by the plaintiff. A dangerous condition that is unrelated to the cause of the harm is insufficient to satisfy the *Haynes* test. Third, the likelihood of the harm must be sufficient to place upon the municipal defendant a clear and unequivocal duty ... to alleviate the dangerous condition. The court in *Haynes* tied the duty to prevent the harm to the likelihood that the dangerous condition would cause harm ... Thus, we consider a clear and unequivocal duty ... to be one that arises when the probability that harm will occur from the dangerous condition is high enough to *necessitate* that the defendant act to alleviate the defect. Finally, the probability that harm will occur must be so high as to require the defendant to act *immediately* to prevent the harm." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Williams v. Housing Authority, supra,* 159 Conn.App. at 705–06, 124 A.3d 537.

[2] In the present case, the preponderance of the evidence supports the plaintiff's claim that the identifiable person-imminent harm exception applies. First, Chambers testified that it was apparent to him that a dangerous condition was created when the hallway lights were turned off given the likelihood that mischief or mayhem would ensue. Chambers stated that although the hallway lights theoretically required a key with two prongs to turn them on or off, based on previous occurrences, the defendants were aware[6] that students were able to manipulate the lights without the need of a key by using a paperclip or similar apparatus. In fact, the Hartford Police Department incident report of May 25, 2015, indicated that a student told the investigating police officer that he shut off the lights near the auditorium with the nail of his left pinky finger.[7] Significantly, Chambers testified that he was concerned that when the lights go off in a high school that "mayhem" was likely or "something dangerous could happen." Despite the fact that, in accordance with the defendants' answer to the request for admissions, the lights in the hallways had been turned off on many occasions prior to May 25, 2012, the defendants took no precautions to prevent students from accessing the light switches to turn off the lights.

***7** Second, the lights being turned off in the hallway likely caused the harm suffered by the plaintiff. The darkened hallways created an environment where something dangerous happened causing her serious injury. The lack of light provided a cloak of anonymity to embolden a student to thoughtlessly project a full bottle of water with enough force to blind the plaintiff. The prevailing darkness made it impossible for the plaintiff to know that anything was coming her way.

Third, the likelihood of harm as a result of the combination of the darkened hallways and the opportunity for horseplay or mayhem was sufficient to place upon the defendants a clear and unequivocal duty to take immediate steps either to prevent the lights from being turned off by students or to employ some other measure to ensure the safety of students when the lights suddenly go off. While this risk of danger may not be as obvious as "sending children into a room containing an unprotected,

operating buzz saw," the risk of danger to students in a darkened hallway, imposed "a clear and unequivocal duty to act immediately" upon school officials. *Haynes v. Middletown, supra,* 314 Conn. at 326 n. 18, 101 A.3d 249. While a briefly darkened hallway in a school with children in their classrooms may not in itself rise to the level of imminent risk, the risk is severely heightened when the darkened hallway is filled with a mass of rambunctious high school students on their way back from lunch period. The opportunity for horseplay under cover of darkness creates an imminent risk of something dangerous happening as acknowledged by the school principal based on his twenty-plus years of experience. Because the lights had been turned off in school hallways on many prior occasions, Chambers and other school officials had a "clear and unequivocal duty" to take precautions to alleviate the danger, particularly when the risk of danger could have been remedied by something as simple as a cover preventing access to the light switches. The fact that no one had been injured on the prior occasions of darkness does not lessen the likelihood or immediacy of the risk of danger.

Finally, the probability that harm will occur when school hallway lights are turned off with students moving between classes or to lunch required the defendants to act immediately to take steps to eliminate the defect. Because there were several prior occasions when the light switches were manipulated by students without the necessity of a specific key, school officials were well aware that relying on the key alone as a measure of protection was totally inadequate. On the day of the plaintiff's injury, a security guard radioed that hallway lights had been turned off. The time that elapsed from the start of the lights being turned off to the time when they were turned back on was approximately five to seven minutes. Within that five- to seven-minute time frame, the plaintiff was seriously injured. Short of safeguarding the switches, the supervision by security personnel, teachers and staff was wholly inadequate. Under all the circumstances, school officials should have taken steps to secure the light switches long before May 25, 2012. See *Haynes v. Middletown, supra,* 314 Conn. at 325, 101 A.3d 249.

B

NEGLIGENCE & CONTRIBUTORY NEGLIGENCE

***8** "The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." (Internal quotation marks omitted.) *McDermott v. State,* 316 Conn. 601, 609, 113 A.3d 419 (2015). "[S]tatutory and constitutional mandates demonstrate that school children attending public schools during school hours are intended to be the beneficiaries of certain duties of care." *Burns v. Board of Education,* 228 Conn. 640, 648, 638 A.2d 1 (1994), overruled on other grounds by *Haynes v. Middletown, supra,* 314 Conn. at 303, 101 A.3d 249. As previously stated, the Board admitted that it had a duty to keep the students at Hartford High School reasonably safe. The defendants breached that duty by failing to prevent harm to the plaintiff through reasonable precautions and supervision. As a consequence, the plaintiff suffered severe permanent damage to her right eye and her overall vision.

[3] The defendants counter that the plaintiff was contributorily negligent in that: "a) she failed to be watchful of others at the time of the subject incident; b) she failed to use her senses and faculties to avoid the incident; and c) she failed to inform employees before the incident took place." The defendants' assertion is unpersuasive and unsupported by the evidence. Accordingly, the court finds that the defendants have failed to sustain their burden of proof that the plaintiff was contributorily negligent.

III

CONCLUSION

[4] For all of the foregoing reasons, the court finds in favor of the plaintiff, by a preponderance of the evidence, and awards economic damages of $14,226.12 and fair, just and reasonable non-economic damages for physical pain and suffering,

mental suffering, loss of enjoyment of life's usual activities and permanency over the twenty-one-year-old plaintiff's sixty-year life expectancy of $1,000,000, for a total judgment of $1,014,226.12, plus costs.

All Citations

Not Reported in A.3d, 2016 WL 785591

Footnotes

1 Plaintiff's exhibit 8, requests for admission number 10 and answer.

2 Plaintiff's exhibit 8, requests for admission numbers 11, 12 and answers.

3 Plaintiff's exhibit 1, Hartford Police Department Incident Report.

4 Plaintiff's exhibit 8, requests for admission numbers 16, 17 and answers.

5 School children are considered members of an identifiable class of beneficiaries as a matter of law for the purposes of the identifiable person-imminent harm exception. *Haynes v. Middletown,* 314 Conn. 303, 325 n. 18, 101 A.3d 249 (2014) ("[W]hen a condition in a school creates a risk of imminent harm, all students are deemed to be identifiable persons subject to the risk ...").

6 Chambers used the collective "we" in his testimony, which the court has taken to mean what he (Chambers) and other school officials knew as of May 25, 2012.

7 See Plaintiff's exhibit 1.

End of Document

2008 WL 5481273

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Windham.

Michael GIARD et al.
v.
TOWN OF PUTNAM.

No. CV085002754S.
|
Dec. 3, 2008.

West KeySummary

1 **Education**⇐Self-inflicted injuries; suicide
Municipal Corporations⇐Health and education
Public Employment⇐Particular torts

A defendant school district's motion to strike a parent's cause of action alleging negligence was granted under doctrine of governmental immunity. The parents brought a lawsuit against a town, school district, and various employees alleging they were negligent in allowing their son to commit suicide. In furtherance of their lawsuit, the parents urged that if the defendants were subject to governmental immunity that their situation was an exception because their son was in a class of identifiable persons subject to imminent harm. Because the son committed suicide at 10:30 at night, while not compelled to be at school, the court ruled that he did not fall within the exception. C.G.S.A. § 52–557n(a)(2)(B).

5 Cases that cite this headnote

Attorneys and Law Firms

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Williams Walsh & O'Connor LLC, North Haven, for Town of Putnam.

BOOTH, J.

FACTS

*1 This cases arises out of the suicide of a Putnam High School senior, Michael Giard (decedent). On March 24, 2008, the

plaintiffs; the estate of Michael Giard (estate); his parents, Caryn Casey (Mrs. Casey); and Mark Casey (Mr. Casey) commenced this action by service of process against the defendants; the town of Putnam (town); the board of education of the town of Putnam (board); Margo Marvin, the superintendent of the Putnam school system; Linda Joyal, the principal of Putnam High School; and Eileen Blair, a guidance counselor at Putnam High School, both in her official and individual capacities.

The complaint contains nine counts, all of which are relevant to the pending motion. In counts one through five, the estate alleges negligence against the town, the board, Marvin, Joyal, and Blair in her official capacity, respectively. In counts six and seven, Mrs. Casey and Mr. Casey, respectively, allege negligent infliction of emotional distress against Blair in her official capacity. Finally, in counts eight and nine, Mrs. and Mr. Casey, respectively, allege intentional infliction of emotional distress against Blair in her individual capacity. The prayer for relief asks for money damages.

The estate alleges facts relevant to counts one through five in the complaint as follows. The board, Marvin, Joyal and Blair are agents of the town, and are jointly responsible, along with the town, for the welfare of the students at Putnam High School. At some point during the school day, shortly before the decedent committed suicide, he expressed an intention to harm or kill himself in the presence of the defendants or their agents. No defendant or agent took any action to warn Mr. or Mrs. Casey or to counsel or protect the decedent. On March 26, 2006, the decedent committed suicide at 10:30 at night. He was pronounced dead at approximately 8:15 the next morning due to methadone toxicity. The failure of the defendants to take steps to prevent the decedent's suicide constitutes a breach of their duty to take reasonable actions to prevent suicide by students. Finally, the estate alleges that the decedent was an identifiable victim subject to imminent harm and his suicide would have been preventable if the defendants had used reasonable care in discharging their duty.

The estate further alleges that all the defendants were negligent in the following ways. (1) The defendants failed to adequately train their agents about suicide prevention; (2) they failed to adequately train their agents to identify risk factors for suicide; (3) they failed to ensure that their agents knew how to act when confronted with a suicidal student; (4) they failed to include suicide prevention in the school curriculum; (5) they failed to adopt a written policy and protocols regarding suicide prevention; (6) they failed to make suicide prevention resources available and to provide opportunities for students and parents to use them; (7) they failed to adopt proper policies requiring notification of parents of suicidal students; (8) they failed to adequately supervise their employees and students; and (9) they hired a guidance counselor who did not know how to properly respond to a threat of suicide.

***2** The estate alleges that Blair was further negligent in failing to follow Putnam High School suicide prevention protocols when confronted with information that the decedent was suicidal, especially the policy requiring her to notify a student's parents when there is a threat of suicide. It also alleges that Blair failed to exercise reasonable care in her capacity as guidance counselor by failing to take action to prevent the decedent's suicide.

The plaintiffs Mrs. and Mr. Casey allege facts relevant to counts six and seven as follows. Blair's failure to take action to prevent the decedent's suicide caused Mrs. and Mr. Casey to suffer severe emotional distress when they found the decedent's lifeless body. As a consequence of this distress, both Mrs. and Mr. Casey require medical treatment. Blair should have known that her failure to take proper action to prevent the decedent's suicide presented an unreasonable risk of emotional distress to Mrs. and Mr. Casey.

Mrs. and Mr. Casey allege facts relevant to counts eight and nine as follows. Blair failed to take reasonable action to prevent the decedent's suicide. She failed to comply with policies regarding reporting of suicide threats. She should have known that her nonfeasance would likely cause severe emotional distress. Her conduct was extreme and outrageous. As a proximate result of her nonfeasance, Blair caused severe emotional distress to Mrs. and Mr. Casey when they discovered their son's dead body. As a result of such distress, they required and will continue to require medical treatment.

On June 11, 2008, the defendants jointly filed a motion to strike and a memorandum of law therewith. The motion seeks to strike counts one through nine on three grounds—(1) the plaintiffs have failed to allege that the asserted negligent conduct proximately caused the decedent's suicide, (2) the defendants are entitled to governmental immunity under General Statutes §§ 52–557n(a)(2)(B) and 52–557n(b)(6) for their alleged negligent conduct, and (3) Mrs. and Mr. Casey have failed to allege, with respect to counts eight and nine, that the defendant Blair's conduct was extreme and outrageous. The plaintiffs filed a joint memorandum in objection to the motion to strike on July 28, 2008. On August 1, 2008, the defendants filed a joint reply

memorandum. The motion was heard on the short calendar on August 18, 2008.

DISCUSSION

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves,* 262 Conn. 480, 498, 815 A.2d 1188 (2003). "[F]or the purpose of a motion to strike, the moving party admits all facts well pleaded." *RK Constructors, Inc. v. Fusco Corp.,* 231 Conn. 381, 383 n. 2, 650 A.2d 153 (1994).

The court must "construe the complaint in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) *Sullivan v. Lake Compounce Theme Park, Inc.,* 277 Conn. 113, 117, 889 A.2d 810 (2006). Accordingly, "[i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Batte–Holmgren v. Commissioner of Public Health,* 281 Conn. 277, 294, 914 A.2d 996 (2007).

***3** As a general rule, the defense of governmental immunity cannot be addressed in a motion to strike because "governmental immunity must be raised as a special defense in the defendant's pleadings ... Nevertheless, [w]here it is apparent from the face of the complaint that the municipality was engaging in a governmental function while performing the acts and omissions complained of by the plaintiff, the defendant is not required to plead governmental immunity as a special defense and may attack the legal sufficiency of the complaint through a motion to strike." (Citations omitted; internal quotation marks omitted.) *Violano v. Fernandez,* 280 Conn. 310, 321, 907 A.2d 1188 (2006).

In its motion to strike, the defendants first assert that the decedent's act of suicide was an unforeseeable intentional act that defeats the element of proximate cause in the estate's negligence claim. They claim that this logic follows the general rule in Connecticut on the foreseeability of suicide with a narrow exception to cases involving physicians and patients. The plaintiffs claim that not withstanding the general rule, this suicide was foreseeable.

Second, the defendants assert that governmental immunity under General Statutes §§ 52–557n(a)(2)(B) and 52–557n(b)(6) applies. They claim that all the claimed acts of negligence are discretionary acts for which the defendants are immune and that, as a matter of law, the decedent was not in an identified class of foreseeable victims—meaning that that exception to immunity does not apply. Furthermore, they claim that since the decedent caused his own death, the defendants have a second ground for immunity because the harm was not proximately caused by the defendants or their agents.

The plaintiffs reply that the board's failure to adopt an anti-suicide policy, as required by General Statutes § 10–221(e), did not involve discretion. Furthermore, the plaintiffs claim that the identifiable person/imminent harm exception applies because the threat of suicide was foreseeable to school officials during school hours. The plaintiffs also claim that, since the decedent's suicide was foreseeable, the actions of the defendants' agents did proximately cause his death, and the defendants' second ground of immunity does not apply.

Third, the defendants claim that a failure to act on information that a student is suicidal is not extreme or outrageous as a matter of law. The plaintiffs counter that Blair owed Mrs. and Mr. Casey a duty to protect their son and her nonfeasance in response to the threat of suicide was extreme and outrageous.

As a preliminary matter, this memorandum addresses the plaintiffs' request to "more fully develop the factual record." (Plaintiffs' Objection, p. 6.) The plaintiff requests that the court deny the motion to strike so that it can "plead facts ... establishing matters in avoidance of a special defense. See Practice Book § 10–57." (Plaintiffs' Objection, p. 6.) The plaintiffs assert that they need to develop the record for two reasons: "[First,] to further illustrate the fact that [the decedent] was a foreseeable victim subject to imminent harm, and [second, to further illustrate] that the defendants' nonfeasance not only increased the risk of his harm, but was also a substantial factor in the cause of his death." (Plaintiffs' Objection, p. 7.)

***4** The plaintiffs are correct that Connecticut courts will deny a motion to strike in which a defense of governmental immunity is interposed if a plaintiff argues the need to develop the factual record. See *Violano v. Fernandez, supra,* 280 Conn. at 325–26, 907 A.2d 1188. However, the plaintiffs have failed to demonstrate that there is a need to further develop the

record.

First, for the reasons stated below in part I, the decedent was not, as a matter of law, within an identified class of foreseeable victims. To obtain a different result, the plaintiffs would need to plead facts inconsistent with those already pleaded. In other words, no amount of factual clarification would change the court's determination. See part I, *infra.*

In terms of the plaintiffs' second reason to develop the record, factual development is unnecessary to the resolution of this case. For counts one, three, four and five, the issue of whether the defendants' conduct was a substantial factor in causing the suicide does not need to be resolved because the motion is decided on other grounds. For count two, this memorandum favors the plaintiffs' position, even without further factual pleading. Finally, whether the defendants' misconduct is the proximate cause of the decedent's suicide is irrelevant to counts six, seven, eight and nine.

COUNT ONE—NEGLIGENCE CLAIM BY THE ESTATE AGAINST THE TOWN

In count one the estate alleges negligence against the town. The town is immune from suit because of General Statutes § 52–557n(a)(2)(B). At common law, a municipality generally had immunity from liability for its torts. *Martel v. Metropolitan District Commission,* 275 Conn. 38, 47, 881 A.2d 194 (2005). The legislature abrogated this common-law immunity by enacting § 52–557n. *Id.,* at 47–48, 881 A.2d 194. Section 52–557n(a)(1) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties ..."

However, there are exceptions to this municipal liability, including § 52–557n(a)(2)(B), which provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by ... negligent acts or omissions [that] require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

In other words, a municipality is immune from its acts or the acts of its employees that are discretionary, or governmental, in nature. *Martel v. Metropolitan District Commission, supra,* 275 Conn. at 48, 881 A.2d 194. However, there is no immunity for ministerial acts, which are acts that are "to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Id.,* at 49, 881 A.2d 194. "Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder ... there are cases where it is apparent from the complaint." (Citation omitted.) *Lombard v. Edward J. Peters, Jr., P.C.,* 252 Conn. 623, 628, 749 A.2d 630 (2000).

***5** Here, it is apparent from the complaint that all of the allegations against the town must be deemed to be of discretionary acts. Many of the allegations of negligence refer to the town's failure to perform a task adequately or properly. The act of performing a task reasonably, properly or adequately involves the exercise of discretion and is not considered ministerial. *Segreto v. Bristol,* 71 Conn.App. 844, 857, 804 A.2d 928, cert. denied, 261 Conn. 941, 808 A.2d 1132 (2002); see also *Violano v. Fernandez, supra,* 280 Conn. at 323, 907 A.2d 1188 (court determined that the municipal officer's duty to "reasonably [and] adequately secure [the plaintiff's] property that was under his care, custody and control" was discretionary); *Evon v. Andrews,* 211 Conn. 501, 506, 559 A.2d 1131 (1989) ("While an inspection by definition involves a checking or testing of an individual against established standards ... what constitutes a reasonable, proper or adequate inspection involves the exercise of judgment." (Citation omitted; internal quotation marks omitted.)).

As to the remaining acts, it is apparent from the complaint that the estate has alleged no directive or written policy mandating that the town perform the acts described and mandating how it is to perform them.[1] To properly allege the existence of a ministerial duty, a plaintiff must allege that "[the defendant] was required to perform in a [prescribed] manner and failed to do so." See *Colon v. Board of Education,* 60 Conn.App. 178, 182, 758 A.2d 900, cert. denied, 255 Conn. 908, 763 A.2d 1034 (2000). That is, there must be "a written policy, directive or guidelines" mandating a particular course of action. *Cobuzzi v. New Britain,* Superior Court, judicial district of New Britain, Docket No. CV 05 4007167 (May 23, 2007, Prestley, J.). For example, in *Kolaniak v. Board of Education,* 28 Conn.App. 277, 281–82, 610 A.2d 193 (1992), the court deemed the duty of

the maintenance staff to keep the sidewalks free from snow and ice to be ministerial because there was a directive from the "policymaking board of education" to do so. On the contrary, in *Colon v. Board of Education, supra,* at 179, 183, 758 A.2d 900, a teacher's act of opening a door in a way that injured a student was considered discretionary because the plaintiff failed to prove that there was a directive regulating the manner by which teachers are to open doors.

A municipality may nonetheless be held liable for the discretionary acts of itself or its agents or employees if the discretionary conduct falls within one of three exceptions: "[F]irst, where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm ... second, where a statute specifically provides for a cause of action against a municipality or municipal official for failure to enforce certain laws ... and third, where the alleged acts involve malice, wantonness or intent to injure, rather than negligence." (Internal quotation marks omitted.) *Burns v. Board of Education,* 228 Conn. 640, 645, 638 A.2d 1 (1994). There is no assertion in the estate's objection that asserts the application of the second or third exception. The only issue is whether the first exception applies.

***6** The decedent did not fall in a class of identifiable persons subject to imminent harm. Schoolchildren, while compelled to be at school, during school hours, can comprise such a class. *Durrant v. Board of Education,* 284 Conn. 91, 107, 931 A.2d 859 (2007). However, the Connecticut Supreme Court has also held, *in dicta,* that schoolchildren, while voluntarily at school for an after-school program, do not fall within an identified class of foreseeable victims. *Id.,* at 104, 931 A.2d 859 (in reversing the Appellate Court's ruling that a parent who was injured when she came to pick her child up from an after-school activity could recover, the court noted that the Appellate Court's reasoning was based on the faulty assumption that the child could himself have recovered if he were injured under those circumstances). The rationale for this distinction is that there is no special duty of care imposed upon school officials when persons are at school voluntarily, unlike when they are compelled to be there. *Id.,* at 108, 931 A.2d 859.

The dicta found in *Durrant* was followed in *Lowenadler v. Mallard,* Superior Court, judicial district of Danbury, Docket No. CV 08 5004054 (July 22, 2008, Shaban, J.). In *Lowenadler,* a schoolchild was injured while voluntarily participating in an after-school basketball program. The court cited *Durrant* in holding that the child was not within an identifiable class of foreseeable victims because he was not compelled to be at the game. See *id.*

In the present case, the decedent's suicide occurred at 10:30 at night, according to the complaint—a time when he was not required to be at school. See *id.* ("At oral argument, the plaintiff conceded the injury occurred after school. Consequently, the plaintiff is not a member of an identifiable class of foreseeable victims."). The town had no special duty to prevent the decedent's suicide after school hours. See *Durrant v. Board of Education,* 284 Conn. 108. Thus, as a matter of law, the decedent was not within an identifiable class of foreseeable victims. Consequently, this narrow exception does not apply.

No amount of factual clarification would compel a different result. The estate has already pleaded that the suicide was attempted at 10:30 at night. The town could not be held liable for a suicide that occurred at a time when the decedent was not required to be at school, no matter what else is reasonably pleaded. Thus there is no need to develop the factual record, and the motion to strike count one is granted.

II

COUNT TWO—NEGLIGENCE CLAIM BY THE ESTATE AGAINST THE BOARD

A

Governmental Immunity Under General Statutes § 52–557n(a)(2)(B)

In count two, the estate alleges negligence against the board. General Statutes § 52–557n may be applied to immunize a board of education just as it could a municipality itself. See *O'Connor v. Board of Education,* 90 Conn.App. 59, 66, 877 A.2d 860, cert. denied, 275 Conn. 912, 882 A.2d 675 (2005); *Gaizler v. Pagani,* Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket No. CV 054004807 (May 24, 2007, Tobin, J.T.R.) (43 Conn. L. Rptr. 518).

*7 The board is immune from all allegations of negligence in count two except for that in subparagraph 23(e). Each allegation of negligence in count two was also alleged in count one against the town. For the same reasons as articulated in part I, it is apparent from the complaint that all allegations except for that in subparagraph 23(e) are of discretionary acts, and no exception to immunity for discretionary acts applies.

As to the allegation in subparagraph 23(e), there is no governmental immunity under § 52–557n(a)(2)(B) because that allegation describes an act that is ministerial as a matter of law. The estate has alleged therein that the "defendant failed to adopt ... a written policy and procedure for dealing with youth suicide prevention and youth suicide attempts ..." (Complaint, count two, ¶ 23(e).) The estate has also alleged, in paragraph four of count two, that General Statutes § 10–221(e) requires the adoption of such a policy by all boards of education in the state.

The total failure to discharge a required duty is considered a ministerial act not subject to immunity. See *Soderlund v. Merrigan,* 110 Conn.App. 389, 397, 955 A.2d 107 (2008) (police officer's complete failure to obey a court order to vacate an arrest warrant was considered a ministerial act because the order was "mandatory"). There is no discretion not to perform a required act, even if the manner of performing the required act could involve discretion. See *Estate of Foster v. Branford,* complex litigation docket at Waterbury, Docket No. X10 CV 05 4010120 (January 29, 2007, Munro, J.) (42 Conn. L. Rptr. 852) ("[T]he duty to provide training and to establish police procedures is ministerial, how training and establishing police procedures is discharged is discretionary.").

The estate does not allege that the board adopted an inadequate policy or procedure. It alleges that the board failed altogether to adopt any policy or procedure regarding suicide prevention as it was required by state law to do. If these allegations are true, then the board could be held liable for negligence in performing this ministerial act. It had no discretion not to adopt some policy or procedure. Thus, § 52–557n(a)(2)(B) does not bar liability for the alleged act complained of in subparagraph 23(e) of count two.

B

Governmental Immunity under General Statues § 52–557n(b)(6)

The board also asserts that it is immune from liability under General Statues § 52–557n(b)(6), which provides: "Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from ... (6) the act or omission of someone other than an employee, officer or agent of the political subdivision ..." This immunity provision only applies if no municipal body or municipal employee proximately caused the injury of which the plaintiff has complained. See *Elliot v. Waterbury,* 245 Conn. 385, 394–409, 715 A.2d 27 (1998) (the court analyzed § 52–557n(b)(6) and determined that it did not require that a plaintiff show a heightened standard of causation with respect to a municipality or a municipal employee to avoid immunity); *Alexander v. Vernon,* Superior Court, complex litigation docket at Tolland, Docket No. X07 CV 02 0078935 (May 3, 2004, Sferrazza, J.) ("[Section] 52–557n(b)(6) codifies the common-law requirement of proximate causation before liability can attach."). The board has also asserted that the estate has no cause of action for negligence because it has failed to allege the element of proximate cause. For the reasons stated below in part II C, the board is not immune from liability under § 52–557n(b)(6) because the estate has properly alleged that the board's conduct was a proximate cause of the decedent's suicide.

C

Proximate Cause

***8** In its motion to strike, the board alleges that "because the act of suicide is a deliberate and intentional act, [it is] relieved from any [careless conduct] for which [it] may be responsible ..." (Motion to Strike, p. 1.) In order to state a cause of action for negligence, a plaintiff must allege sufficient facts to establish the required elements of duty, breach, actual causation, proximate causation and damages. See *Archambault v. Soneco/Northeastern, Inc.,* 287 Conn. 20, 32, 946 A.2d 839 (2008). The estate has alleged sufficient facts to satisfy the element of proximate cause.

"The test of proximate cause is whether the defendant's conduct is a 'substantial factor' in producing the plaintiff's injury." *Craig v. Driscoll,* 262 Conn. 312, 331, 813 A.2d 1003 (2003). In determining whether something is a substantial factor in producing harm, the court must ask "whether the harm [that] occurred was of the same general nature as the foreseeable risk created by the defendant's negligence." (Internal quotation marks omitted.) *Carrano v. Yale–New Haven Hospital,* 279 Conn. 622, 656, 904 A.2d 149 (2006).

The board correctly notes that the general rule in Connecticut is that "negligence actions seeking damages for the suicide of another will not lie because the act of suicide is considered a deliberate, intentional and intervening act [that] precludes a finding that a given defendant, in fact, is responsible for the harm." *Edwards v. Tardif,* 240 Conn. 610, 615, 692 A.2d 1266 (1997).

The one remaining allegation against the board states that it "failed to adopt ... a written policy and procedure for dealing with youth suicide prevention and youth suicide attempts ..."; (Complaint, count two, ¶ 23(e)); in derogation of its duty under General Statutes § 10–221(e). Section 10–221(e) provides in relevant part: "Not later than July 1, 1990, each local and regional board of education shall adopt a written policy and procedures for dealing with youth suicide prevention and youth suicide attempts." From the face of the statute it can be determined that the purpose of the directive is to require school boards to take action to minimize incidents of preventable suicide among public schoolchildren. It is therefore foreseeable that the failure to adopt such a policy or such procedures specifically mandated by § 10–221(e) may lead to occurrences of suicide that the existence of proper policies and procedures may have prevented. In other words, suicides are within the scope of the risk created by the board's alleged negligent failure to adopt any suicide-prevention policies. The estate has alleged sufficient facts to find that the element of proximate cause is satisfied with respect to the claims founded on § 10–221(e). The motion to strike is denied as to count two.

III

COUNTS THREE AND FOUR—NEGLIGENCE CLAIMS BY THE ESTATE AGAINST MARVIN AND JOYAL, IN THEIR OFFICIAL CAPACITIES

Counts three and four allege identical negligence claims against Marvin, the Putnam school superintendent, and Joyal, the principal of Putnam High School, respectively. When a municipal employee is sued in his or her official capacity, "the suit is, in effect, a suit against the municipality and the individual defendants are entitled to the protection of the municipality's immunity." *Hadden v. Southern New England Telephone Co.,* Superior Court, complex litigation docket at Waterbury, Docket Nos. X06 CV 03 0183016, X06 CV 03 0183017 (August 18, 2004, Alander, J.); see also *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). The Connecticut Supreme Court, in a line of cases, has equated common-law governmental immunity for municipal employees with the immunity articulated in § 52–557n(a)(2)(B). See *Martel v. Metropolitan District Commission, supra,* 275 Conn. at 48, 881 A.2d 194; *Elliot v. Waterbury, supra,* 245 Conn. at 410–11, 715 A.2d 27. Thus, both Marvin and Joyal may be immune from liability for their alleged acts of negligence.

***9** Each act alleged in counts three and four must be deemed discretionary as a matter of law. It is apparent from the complaint that the plaintiff has not alleged that either defendant "was required to perform in a [prescribed] manner and failed to do so"; *Colon v. Board of Education, supra,* 60 Conn.App. at 182, 758 A.2d 900; or that there was any "written policy, directive or guidelines" mandating that they take a particular course of action. *Cobuzzi v. New Britain, supra,* Superior Court, Docket No. CV 05 4007167. Without such allegations, one can only conclude that the defendants had discretion to perform, and in the means of performing, each alleged act. For the reasons stated in part I, no exception to immunity for discretionary acts applies in this case. The motion to strike counts three and four is granted.

IV

COUNT FIVE—NEGLIGENCE CLAIM BY THE ESTATE AGAINST BLAIR, IN HER OFFICIAL CAPACITY

Count five alleges negligence against the defendant Blair in her official capacity. Since Blair is sued as a municipal employee, she may be eligible for governmental immunity under General Statutes § 52–557n. See *Hadden v. Southern New England Telephone Co., supra,* Superior Court, Docket Nos. X06 CV 03 0183016, X06 CV 03 0183017; part III. For the reasons stated in part I, each alleged act is discretionary as a matter of law, except for the acts alleged in subparagraph 25(f). To those discretionary acts, governmental immunity applies under § 52–557n(a)(2)(B) and no exception to governmental immunity for discretionary acts applies. See part I.

Subparagraph 25(f) of count five of the complaint provides: "[Blair was negligent] in that, upon information and belief, [she] failed to comply with policies and procedures [that] require high school personnel to notify parents [or] guardians when a student threatens [or] attempts suicide." The estate also alleges in paragraph thirteen of count five, incorporated by reference from count one, that "the defendant Blair ... *received information* that [the decedent] was suicidal [or] had threatened to kill himself, yet she did nothing to notify or warn [his] parents of his pending suicide." (Emphasis added.)

While subparagraph 25(f) describes a mandatory duty to report a threat of suicide, and the estate also alleges that Blair failed to report, the estate has failed to allege facts and circumstances that, if proven, would demonstrate that Blair was under a duty to report pursuant to the alleged policy. Thus, her alleged failure to report, under the circumstances, was an act of discretion.

Without pleading the existence of a duty compelling a municipal defendant to act a certain way under the circumstances, the plaintiff cannot avoid the defense of governmental immunity. See *Gordon v. Bridgeport Housing Authority,* 208 Conn. 161, 181, 544 A.2d 1185 (1988). In *Gordon,* a man was assaulted and robbed both outside and inside a Bridgeport housing project, rendering him brain-dead from his injuries. *Id.,* at 162–63, 544 A.2d 1185. The conservatrix of his estate sued the defendant housing authority claiming it was negligent in providing security for the housing project. *Id.* The court held that whether the act of providing security was discretionary or ministerial was irrelevant because the plaintiff had failed to allege that the defendant had any duty at all to the injured man to provide security. *Id.,* at 181, 544 A.2d 1185.

***10** The facts alleged in the present case do not show that Blair was under a duty to the decedent to warn the decedent's parents at the time she allegedly received the "information." The plaintiff does not allege that the policy described in subparagraph 25(f) of count five requires school employees to warn parents whenever they merely receive information about a threat. The plain language of the policy, as alleged, requires that school employees report only an actual threat of suicide. It is implicit from the language in the complaint that the employee must have personal knowledge of the threat.

The estate does not allege that the decedent threatened suicide directly to Blair, which would have triggered her duty to notify under the high school's alleged policy. It only alleges that Blair received unspecified information that the decedent was suicidal. In the absence of an allegation that Blair had personal knowledge that the decedent had threatened to kill himself, Blair could not have been under a duty to report. Therefore, she could not, as a matter of law, have neglected a ministerial duty. The motion to strike is granted as to count five.

V

COUNTS SIX AND SEVEN—CLAIMS OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS BY MRS. AND MR. CASEY AGAINST BLAIR, IN HER OFFICIAL CAPACITY

In counts six and seven, Mrs. and Mr. Casey allege negligent infliction of emotional distress against Blair, in her official capacity, because of her failure to counsel or otherwise help the decedent or to warn them of his impending suicide. As to these counts, Blair is protected by governmental immunity under General Statutes § 52–557n(a)(2)(B). See part IV. Neither Mrs. or Mr. Casey allege that Blair was under any duty to parents of students to act in a certain way under the alleged circumstances. See *Gordon v. Bridgeport Housing Authority, supra,* 208 Conn. at 181, 544 A.2d 1185; part IV. Thus, Blair's actions were discretionary, and, for the reasons stated in part I, no exception to immunity applies. The motion to strike counts six and seven is granted.

VI

COUNTS EIGHT AND NINE—CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BY MRS. AND MR. CASEY AGAINST BLAIR, IN HER INDIVIDUAL CAPACITY

In counts eight and nine, Mrs. and Mr. Casey allege that Blair's failure to take action to prevent the decedent's suicide or to warn them of his suicidal disposition constitutes an intentional infliction of emotional distress. Blair seeks to strike counts eight and nine on the ground that Mrs. and Mr. Casey have failed to allege extreme and outrageous conduct. They have indeed failed to so allege, and thus have not stated actions for intentional infliction of emotional distress.

"In order for the plaintiff to prevail in a case for liability under ... [intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that [she] knew or should have known that emotional distress was the likely result of [her] conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." (Internal quotation marks omitted.) *Appleton v. Board of Education,* 254 Conn. 205, 210, 757 A.2d 1059 (2000).

***11** "Liability for intentional infliction of emotional distress requires conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause ... mental distress of a very serious kind." *DeLaurentis v. New Haven,* 220 Conn. 225, 267, 597 A.2d 807 (1991); W. Prosser & W. Keeton, Torts (5th Ed.1984), § 12, p. 60. In counts eight and nine, which contain essentially the same allegations, Mrs. and Mr. Casey allege that Blair failed to follow established procedure when she received information that the decedent was suicidal and that she failed to take any steps to prevent his suicide. In order to determine whether the elements of the claim of intentional infliction of emotional distress are met, the court must consider whether Blair's nonfeasance rises to the level of extreme and outrageous conduct. See *Ward v. Greene,* Superior Court, complex litigation docket at Norwich, Docket No. X04 CV 99 0120118 (March 20, 2001, Koletsky, J.).

In *Estate of Smith v. West Hartford,* Superior Court, complex litigation docket at Tolland, Docket No. X07 CV 02 0080891 (July 28, 2003, Sferrazza, J.), a widow sued officers of the West Hartford police department for failing to take steps to prevent the suicide of her husband—also a police officer. She alleged in one of the counts that the officers, through their nonfeasance in response to signs of her husband's suicidal tendencies, intentionally caused her to suffer emotional distress. *Id.* She claimed that their failure to "refer [her husband] to a professional counselor ... to remove his firearm, and ... to reassign him to desk duty" constituted extreme and outrageous conduct. *Id.* The court disagreed and held that the lack of "affirmative misbehavior" on the part of the defendants, and the fact that the plaintiff did not suffer "public ridicule," rendered the conduct insufficient to be extreme and outrageous as a matter of law. *Id.*

In light of *Estate of Smith,* Blair's conduct in the present case could not, as a matter of law, be extreme and outrageous. The alleged misconduct is the mere failure to act on unspecified information that the decedent was suicidal, without even an allegation that this nonfeasance was willful. This cannot constitute "affirmative misbehavior." Furthermore, there is no element of "public ridicule" present in this case. The defendants' motion to strike counts eight and nine is granted because Blair's conduct does not "[exceed] all bounds usually tolerated by decent society ..." *DeLaurentis v. New Haven, supra,* 220 Conn. at 267, 597 A.2d 807.

CONCLUSION

The motion to strike counts one, three, four, five, six and seven is granted on the ground of governmental immunity under General Statutes § 52–557n(a)(2)(B). The motion to strike counts eight and nine is granted on the ground that the plaintiffs have failed to allege extreme and outrageous conduct, which is necessary to allege a cause of action for intentional infliction of emotional distress. The motion to strike count two is denied because governmental immunity does not apply to the failure to make any attempt to comply with Gen.Stat. § 10–221(e) and the plaintiff has properly stated the element of proximate cause.

All Citations

Not Reported in A.2d, 2008 WL 5481273, 46 Conn. L. Rptr. 782

Footnotes

1 The only statute imposing a mandatory duty mentioned by the plaintiff in count one is General Statutes § 10–221(e), which imposes a duty on a town's board of education, but not upon the town itself. Section 10–221(e) provides in relevant part: "*[E]ach local and regional board of education* shall adopt a written policy and procedures for dealing with youth suicide prevention and youth suicide attempts." (Emphasis added.) The plaintiff has not established that the town has any duty to ensure that the board has adopted such a policy. Furthermore, when state law mandates an action by town employees, they are agents of the state and not the town in performing those duties; *Antalik v. Board of Education,* Superior Court, judicial district of Litchfield, Docket No CV 075001762 (August 13, 2008, Gallagher, J.) (46 Conn. L. Rptr. 179); and the town is not liable for their torts. See, e.g., *Hartwell v. Town of New Milford,* 50 Conn. 522, 522, 524–25 (1883) (town not liable when town treasurer failed to follow state-mandated duty to pay a bounty to children of Civil War veterans).

End of Document

EXHIBIT 9

FST-CV15-5015035-S	) SUPERIOR COURT
	)
GIRL DOE PPA MOTHER DOE AND FATHER DOE, MOTHER DOE INDIVIDUALLY AND FATHER DOE INDIVIDUALLY, Plaintiffs,	) JUDICIAL DISTRICT OF STAMFORD/NORWALK AT STAMFORD
vs.	)
WILTON BOARD OF EDUCATION AND TOWN OF Wilton, Defendants.	)

DEPOSITION OF: ELIZABETH MORELLI

DATE: NOVEMBER 2, 2016

HELD AT: SILVER, GOLUB & TEITELL, LLP
184 ATLANTIC STREET
STAMFORD, CT

BRANDON HUSEBY REPORTING & VIDEO
249 Pearl Street
Hartford, CT 06103
(860) 549-1850
(800) 852-4589

Reporter: Samantha M. Howell, LSR #00462

in court and you swore to tell the truth?

A Yes.

Q Okay. Now, just to establish the way today's proceedings came about, you didn't come here voluntarily; correct?

A I forgot; yes.

Q You were served in hand with a subpoena that compelled you to come here and required you to testify?

A Yes, yes.

Q Okay. And before we went on the record today, you and I have never had any substantive communications; correct?

A No.

Q In other words, am I correct when I say that?

A Yes, you are correct.

Q And have you ever spoken to any of the lawyers for the Town of Wilton before the deposition began?

A No.

Q Okay. All right. Just so you understand, this is a lawsuit -- a civil lawsuit that's been brought against the Town of Wilton and the Wilton Board of Ed related to events involving a person named Eric Von Kohorn; do you know him?

A Yes.

Q Okay. And we understand from other information

had been arrested on charges related to child pornography?

A Yes.

Q Before you knew he had been arrested, did you know he was working in the Wilton Public Schools?

A A couple years before that his -- the name came up that he was working there.

Q Okay. Do you remember who you heard that from?

A Another friend that works there.

Q All right.

A Do I have to say her name?

Q Yeah, I would like to know who that is.

A Lisa Faroni.

Q And Lisa Faroni knew that you knew Eric Von Kohorn and happened to mention it?

A Yeah, it was a six degrees of separation kind of thing.

Q Okay. Did anyone from the Wilton Public Schools contact you to ask about Eric Von Kohorn --

A Oh, no.

Q Let me finish my question.

A Sorry.

Q That's okay. Before Eric Von Kohorn began working for the Wilton Public Schools, did anyone from the Wilton Public Schools ever contact you to ask about him?

A No.

Q Okay. At sometime after he was arrested, did anyone from the Wilton Public Schools ever contact you to ask about Eric Von Kohorn?

A No.

Q So no official or employee of the Wilton Public Schools has ever contacted you to ask you about your experience in working with Eric Von Kohorn; is that true?

A True.

Q And you mentioned it was about roughly 15 years ago that you believe you worked with him?

A Fifteen. My daughter was three, so she's sixteen now, so, yeah, thirteen years ago.

Q Okay. And what was the nature of your work with Eric Von Kohorn, just generally?

A I was hired as a teacher's aide, and he was also a teacher's aide there.

Q And there is where?

A Oh, I'm sorry; St. Peter's Lutheran Preschool.

Q Okay. Did there come a time where you became the director of the St. Peter's Lutheran Preschool?

A Yes.

Q When did that happen?

A I think two years, I've been there two years. The current director was going to another state. She

Preschool?

A I don't know.

Q Did you ever know him to have any responsibility in that regard?

A I don't know what he and Kathy would work on when she was together with him, so I don't know. I really don't know.

Q Okay. Did you ever witness him having any role -- you, personally, ever witness him having any role in setting curriculum?

A No.

Q Did Eric Von Kohorn ever have any role in hiring teachers at the St. Peter's Lutheran Preschool?

A No.

Q Did Eric Von Kohorn ever have any role in leading parent-teacher conferences at St. Peter Lutheran Preschool?

A I don't think so. I didn't, and I was an aide, and he didn't, so I'm assuming he didn't either. I think Mrs. Hughes ran most of the parent-teacher conferences.

Q Okay. Did Eric Von Kohorn have any role in graduating students of the St. Peter Lutheran Preschool?

A We had a graduation ceremony where we were all present and would hand them diplomas and give them caps and all that. The pomp and circumstance for three year olds.

Q Okay. And did Eric Von Kohorn ever have any role in organizing payroll at the St. Peter Lutheran Preschool?

MR. GERARDE: Objection to form.

THE WITNESS: No.

Q (By Mr. Slager) Did Eric Von Kohorn ever have any role in organizing tuition at the St. Peter Lutheran Preschool?

A No.

Q Did Eric Von Kohorn teach reading to students at the St. Peter Lutheran Preschool?

A We didn't teach the three year olds to read, we read to them.

Q Okay. Did Eric Von Kohorn have any role ever of teaching the students at the St. Peter Lutheran Preschool mathematics?

A No.

Q Again --

A Unless you consider counting one, two, three mathematics.

Q Okay. But there was no math being taught to students there?

A No.

Q Okay. Did Eric Von Kohorn have any role in organizing field trips at the St. Peter Lutheran Preschool?

A Did we go on field trips? I don't know that he organized them, I think that we all went on them. I doubt that he organized them.

MR. GERARDE: Objection to form.

Q (By Mr. Slager) To the best of your knowledge, did he ever organize any field trips?

A No.

Q And if someone from the Wilton Public Schools had called you before hiring Eric Von Kohorn and asked you the same questions I just asked you, would you have answered the same way?

A Yeah. Yes.

Q Now, you mentioned that -- that it was a school policy at the St. Peter Lutheran Preschool that no adult could ever be left alone with a child; correct?

A Correct.

Q And were the children at the St. Lutheran Preschool -- St. Peter Lutheran Preschool toilet trained?

A Yes. I'm trying to remember, yes.

Q Okay.

A And if they did use the bathroom, it was made clear that we were not allowed to wipe them even if they did. If a child had an accident, the parent was called to come in.

Q Okay. And what was your understanding of the

REDIRECT EXAMINATION

BY MR. SLAGER:

Q But if someone had asked you as a part of a job reference whether Eric set curriculum in the St. Peter Lutheran Preschool, you would have told him he did not?

A Correct.

Q And if someone had called you and asked you whether Eric ever hired teachers at the St. Peter Lutheran Preschool, what would you have said?

A No, he did not.

Q And if someone ever called you and asked you whether he taught reading at the St. Peter Lutheran Preschool, what would you have said?

A No.

Q And if anyone ever called you and said did Eric Von Kohorn teach math at the St. Peter Lutheran Preschool, what would you have said?

A No.

Q If someone ever asked you -- called you on a job reference for Eric Von Kohorn and said did Eric ever lead parent-teacher conferences, what would you have said?

A No.

Q And if anyone ever called you as part of a job

reference and said did Eric Von Kohorn ever organize payroll and tuition at the St. Peter Lutheran Preschool, what would you have told them?

A No.

Q And -- okay, that's all I have. Thanks.

RECROSS-EXAMINATION

BY MR. GERARDE:

Q And now I need to follow-up. Let me just stay with the last piece. I take it when you say that you don't know, for example, whether Eric assisted with payroll or met with a parent at a parent-teacher conference, this is -- to your knowledge, this didn't occur; is that what you mean?

A Technically, yes.

Q All right. Did you ever sit in on a parent-teacher conference with one of the teachers?

A No.

Q And were you present for every parent-teacher conference that occurred in the preschool?

A To the best of my knowledge, the only person that held parent-teacher conferences was Kathy Hughes.

Q Okay. But you don't know if she ever asked Eric

EXHIBIT 10

11/28/07 ... FAX → 834-49...

Eric L. Von Kohorn

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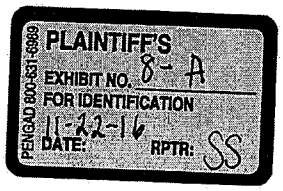

Objective

Helping children reach their goals

Education

2001 – 2004 Berklee College of Music (2 years)
Boston, MA
Major: Jazz Voice

1998 + 1999 Boston University Tanglewood Institute (2 summers)
Boston, MA
Summer choral music program

1996 – 1999 Greens Farms Academy
Greens Farms, CT
Graduated June 1999

Experience

2006 – 2007 **Wave Hill Bakery**
baking, mixing, grinding, shaping, managing the staff and physical plant during production, selling and quality control

2004 – 2006 **St. Peter Lutheran Preschool**, Norwalk, CT
setting curriculum, hiring teachers, teaching reading, math, music, large and fine motor skills, crafts, organizing field trips, teaching hygiene and safety, leading parent/teacher conferences, organizing payroll and tuition, administering first aid and handling discipline, graduating students

2000 – 2001 **Pier One**
sales associate

Activities and Service

2006	Norwalk Community College Norwalk, CT Diploma and Certification in Bartending Graduated February 2006
2005 – 2006	Board of Deacons Choir and Recitals St. Peter's Lutheran Church
2005	Connecticut School of Broadcasting Stratford, CT Certificate in Radio/TV Broadcasting Graduated September 2005

Honors

Graduated Honors from High School
Summa Cum Laude on National Latin Exam

References Available Upon Request

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CERTIFICATION

I certify that a copy of the above was or will immediately be mailed or delivered electronically on this 31st day of March, 2017 to:

Thomas R. Gerarde, Esq.
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114
tgerarde@hl-law.com
For defendants: Wilton Board of Education; and Town of Wilton

and that written consent for electronic delivery was received from all counsel and self-represented parties of record who were or will immediately be electronically served.

BY */s/ 417769*
PAUL A. SLAGER